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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 799

MARY F. McCONNELL, APPELLANT,

vs.

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED , 189 .

(16089)

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a No. 258.

United States Circuit Court of Appeals, Sixth Circuit.

MARY F. McCONNELL, Appellant,
vs.
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK, Appellee.

Transcript of Record.

1 United States Circuit Court of Appeals for the Sixth Circuit.

Transcript of the record in the case of Mary F. McConnell *vs.* Provident Savings Life Assurance Society of New York, in the chancery court at Knoxville, being cause No. 5979 on the rule docket of said court.

Prosecution Bond.

Filed Feb. 26th, 1894. W. L. Trent, C. & M.

STATE OF TENNESSEE:

Chancery Court at Knoxville.

Know all men by these presents, that we, Mary F. McConnell and C. L. McConnell are held and firmly bound unto Provident Savings Life Assurance Society of New York, in the penal sum of two hundred and fifty dollars, to be void on condition that said principal obligator shall prosecute with effect a suit which she is about to commence in said court against said obligee, or pay all costs and damages incident on failure thereof, or which may be adjudged against them.

February 26th, 1894.

MARY F. McCONNELL. [SEAL.]
C. L. McCONNELL. [SEAL.]

Original Bill.

Filed February 26th, 1894. W. L. Trent, C. & M., by W. A. Galbraith, D. C. M.

MARY F. McCONNELL (Widow), a Resident of Knoxville Co., Tennessee, Complainant,
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, a Corporation, etc., Domiciled in the City and State of New York, Having H. M. Aiken as its Local Agent at Knoxville, a Citizen of Knox County, Tennessee, Defendant.

To the Honorable Henry R. Gibson, chancellor, presiding at Knoxville, Tennessee:

2 Complainant respectively shows to the court as follows:

"I."

That she is a resident of Knox county, Tennessee, and the widow of R. A. McConnell, deceased, who, during his lifetime resided in Knox county, Tennessee, and who, on the 27th day of July, 1893, was accidentally injured by having a moving engine run over and crush his leg, and as a result of the accidental injuries thus received, died on the morning of July 28th, 1893, at Halsey, in Whitley county, Kentucky, where said accident occurred.

"II."

That the defendant, The Provident Savings Life Assurance Society is a corporation, organized under the laws of the State of New York, having its domicile in the city and State of New York, and that H. M. Aiken, a citizen and resident of Knox county, Tennessee, is its local agent; that on April 27th, 1893, the said R. A. McConnell effected the issuance and delivery to him by the defendant, The Provident Savings Life Assurance Society, of a policy of issuance upon his life for the sum of five thousand dollars, being policy No. 52941 in said assurance society, and which said policy is made payable upon its face to this complainant, as wife of said R. A. McConnell, in case of his death, and which said policy is herewith filed marked Exhibit "A" and prayed to be taken and treated as part of this bill, but which need not be copied to accompany process.

"III."

That pursuant to the provisions of said policy, and the rules of defendant assurance society, complainant caused to be prepared upon the blanks of and furnished by the defendant assurance society, and in regular form for that purpose, proofs of the death of the said R. A. McConnell, and forwarded same by mail to the defendant assurance society on September 25th, 1893.

"IV."

That under and by the terms of said policy, the defendant assurance society agrees and binds itself to pay to complainant as beneficiary thereunder, the full amount of said policy (less any indebtedness on account thereof) within sixty days after acceptance
3 at the office of the society in the city of New York, of satisfactory proofs of the death of said R. A. McConnell.

The proofs of death thus required were forwarded to said defendant, as hereinbefore shown, on September 25th, 1893, and receipt thereof was acknowledged by due course of mail, and the sixty days within which it is provided that said payment of policy shall be made have expired, and complainant has caused demand to be made for its payment, and said defendant, assurance society, has wholly failed and refused, and still fails and refuses to pay said policy as is therein stipulated.

"V."

Complainant shows that said policy contains the following recitation upon its face:

"The Provident Savings Life Assurance Society of New York, in consideration of the stipulations and agreements in the application herefor, and upon the next page of this policy, all of which are part of this contract, and in consideration also of the payment of seventy-six dollars and twenty-five cents, being the premium hereon for the first year, promise to pay to Mary F. McConnell, wife of Robert A. McConnell, or to her legal representatives or assigns, the sum of five thousand dollars (less any indebtedness on account of this policy) within sixty days after acceptance at the office of the society in the city of New York, of satisfactory proof of the death of Robert A. McConnell, of Knoxville, county of Knox and State of Tennessee, (the insured under this policy) provided such death shall occur on or before the 27th day of April, A. D. 1894."

And complainant avers and shows that there was actually paid, at the time and upon the issuance and delivery of said policy, the sum of twenty dollars and sixty-five cents, on account of the premium thereon for the current year, ending April 27th, 1894, and she is advised and charges that the defendant, The Provident Savings Life Assurance Society, is justly indebted to her, under and by virtue of said policy and contract, in the full amount of said policy, to wit, the sum of five thousand dollars ($5,000.00) less that portion of the premium due thereon for the current year ending April 27th, 1894, after deducting said sum of twenty dollars and sixty-five cents so paid as aforesaid, upon the delivery of said policy, and she is further advised that she is entitled, under suitable action thereon, to judgment and recovery therefor.

(1.) Premises considered, complainant prays that the defendant named as such in the caption be made such by apt words and due process, and be required to answer the allegations of this bill fully and truly, according to the practice of this court.

4 (2.) That judgment and decree be pronounced in complainant's favor for the amount of said policy with interest thereon from the date when the same became payable, according to its terms, less the unpaid portion of the premium thereon for the current year.

(3.) And if mistaken in her special prayer, she prays for all such other, further, different and general relief as the facts may warrant and as the ends of justice may require.

TULLY R. CORNICK,
R. H. SANSOM, *Solicitors.*

(*Copy of Policy.*)

Number 52941. Amount, $5,000.00.

The Provident Savings Life Assurance Society of New York,

In consideration of the stipulations and agreements in the application herefor, and upon the next page of this policy, all of which

are a part of this contract; and in consideration also of the payment of seventy-six dollars and twenty-five cents, being the premium hereon for the first year, promises to pay to Mary F. McConnell, wife of Robert A. McConnell, or to her legal representatives or assigns, the sum of five thousand dollars (less any indebtedness on account of this policy) within sixty days after acceptance, at the office of the society in the city of New York of satisfactory proofs of the death of Robert A. McConnell, of Knoxville, county of Knox and State of Tennessee, (the insured under this policy) provided such death shall occur on or before the twenty-seventh day of April, A. D. 1894.

And the said society further agrees to renew and extend this insurance upon like conditions, without medical re-examination, during each successive year of the life of the insured from date hereof, upon the payment on or before the twenty-seventh day of April in each such year, of the renewal premiums in accordance with the schedule rates, less the dividends awarded hereon.

Examined: "H."

In witness whereof, the Provident Savings Life Assurance Society of New York, has caused this policy to be signed by its president and secretary, at its office in the city of New York, on this the twenty-seventh day of April, A. D. one thousand eight hundred and ninety-three.

SHEPPARD HOMANS, *President.*
W. E. STEVENS, *Secretary.*

Stipulations and Agreements.

Regarding premiums and their payment.

This policy does not go into effect until the first premium has been actually paid during the lifetime and good health of the within-named insured.

All premiums are due at the office of the society in the city of New York. For the convenience of policy-holders, they may be paid to an authorized agent of the society, but only in exchange for a receipt signed by the president or secretary, and countersigned by such agent. Failure to pay any premium or semi-annual or quarterly installment thereof when due will thereupon terminate this policy. Any unpaid quarterly or semi-annual installment of the current year's premium, and any other indebtedness to the society will be deducted in any settlement of this policy.

The annual premiums on this policy may be paid by quarterly installments as hereinbefore stated, on or before the twenty-seventh days of April, July, October and January in each year.

Schedule of Yearly Renewable Rates of Premium Required to Renew Each $1,000 *of Insurance.*

For age actually attained 16.25, annual premium 13.75, semi-annual installment 7.15, quarterly installment 3.72; for age actually attained 41, annual premium 17.48, semi-annual installment 9.09, quarterly installment 4.73; for age actually attained 57, annual premium 33.25, semi-annual installment 17.30, quarterly installment 9.00.

For age actually attained 26, annual premium 14.00, semi-annual installment 7.28, quarterly installment 3.80; for age actually attained 42, annual premium 17.80, semi-annual installment 9.26, quarterly installment 4.82; for age actually attained 58, annual premium 35.75, semi-annual installment 18.60, quarterly installment 9.67.

For age actually attained 27, annual premium 14.25, semi-annual installment 7.41, quarterly installment 3.85; for age actually attained 43, annual premium 18.16, semi-annual installment 9.44, quarterly installment 4.91; for age actually attained 59, annual premium 38.50, semi-annual installment 20.02, quarterly installment 10.41.

For age actually attained 28, annual premium 14.50, semi-annual installment 7.54, quarterly installment 3.92; for age actually attained 44, annual premium 18.60, semi-annual installment 9.67, quarterly installment 5.03; for age actually attained 60, annual premium 41.50, semi-annual installment 21.58, quarterly installment 11.22.

For age actually attained 29, annual premium 14.75, semi-annual installment 7.67, quarterly installment 3.98; for age actually attained 45, annual premium 19.04, semi-annual installment 9.90, quarterly installment 5.15.

For age actually attained 30, annual premium 15.00, semi-annual installment 7.80, quarterly installment 4.06; for age actually attained 46, annual premium 19.60, semi-annual installment 10.19, quarterly installment 5.30.

For age actually attained 31, annual premium 15.25, semi-annual installment 7.94, quarterly installment 4.13; for age actually attained 47, annual premium 20.20, semi-annual installment 10.50, quarterly installment 5.46.

For age actually attained 32, annual premium 15.50, semi-annual installment 8.06, quarterly installment 4.19; for age actually attained 48, annual premium 20.88, semi-annual installment 10.86, quarterly installment 5.65.

For age actually attained 33, annual premium 15.70, semi-annual installment 8.16, quarterly installment 4.24; for age actually attained 49, annual premium 21.72, semi-annual installment 11.30, quarterly installment 5.88.

For age actually attained 34, annual premium 15.88, semi-annual installment 8.26, quarterly installment 4.30; for age actually

attained 50, annual premium 22.64, semi-annual installment 11.77, quarterly installment 6.12.

For age actually attained 35, annual premium 16.04, semi-annual installment 8.34, quarterly installment 4.34; for age actually attained 51, annual premium 23.68, semi-annual installment 12.31, quarterly installment 6.40.

For age actually attained 36, annual premium 16.24, semi-annual installment 8.44, quarterly installment 4.39; for age actually attained 52, annual premium 24.84, semi-annual installment 12.92, quarterly installment 6.72.

For age actually attained 37, annual premium 16.44, semi-annual installment 8.55, quarterly installment 4.45; for age actually attained 53, annual premium 26.12, semi-annual installment 13.58, quarterly installment 7.06.

For age actually attained 38, annual premium 16.88, semi-annual installment 8.67, quarterly installment 4.50; for age actually attained 54, annual premium 27.60, semi-annual installment 14.35, quarterly installment 7.47.

For age actually attained 39, annual premium 16.92, semi-annual installment 8.80, quarterly installment 4.58; for age actually attained 55, annual premium 29.24, semi-annual installment 15, annual installment 7.80.

7 For age actually attained 40, annual premium 17.20, semi-annual installment 8.94, quarterly installment 4.65; for age actually attained 56, annual premium 31.00, semi-annual installment 16.12, quarterly installment 8.38.

No policy is issued at an age higher than sixty years. Schedule rates on same basis as above, for renewal above that age, subject to reduction by dividends, will be furnished on request.

Regarding the Death Fund and the Guaranty Fund.

After deducting the expense charge, which is limited to four dollars per annum on each thousand dollars, the society agree to divide the residue of each renewal premium received by it upon this policy as follows:

Such amount as shall be required for this policy's share of death losses, will be appropriated as a death fund, to be used solely in settlement of death claims. The remainder thereof will be retained as a guaranty fund. The amounts so retained on account of this policy will be used towards off-setting any increase in the premium on this policy from year to year; or provided this policy, after five full years' premiums have been paid, be terminated solely by non-payment of any stipulated premium when due, eighty per cent. of any amount so retained but not so used will be applied to extend this insurance; or if application be made therefor while this policy is in full force and effect, to purchase paid-up insurance.

Regarding Agents.

No agent is, or will be authorized to make, alter or discharge this contract, or to waive any forfeiture thereof, or to extend this insur-

sance, or to grant permits, or to receive for premiums anything except cash.

Regarding Assignments and Proof of Interest.

Assignments of this policy must be in writing and a duplicate thereof must be furnished the society. Any claim arising under an assignment shall be subject to satisfactory proof of interest.

Copy.

Application to the Provident Savings Life Assurance Society of New York.

Part I.

Full name of applicant whose life is offered for insurance.

Amount of policy applied for, $——. Residence of applicant, ——; town, ——; county, ——; State, ——.

Specific occupation, ——.

8 (If clerk, merchant, manufacturer or mechanic, state definitely the goods handled.)

Where shall notices of premiums be addressed?

Place of birth, ——; town, ——; county, ——; State, ——. Date of birth: Year, ——; month, ——; day, ——. Age at nearest birthday, ——.

Are you married?

What cash installment has been paid to make the policy under this application binding from this date, providing the risk is assumed by the society?

A —— annual payment of $—— has been paid upon condition that if the risk is not assumed by the society, this sum is to be returned, in accordance with the provisions of the society's official binding receipt No. —, given as a voucher for said payment.

Annually.

Premium payable S. "

Erase except as desired. Quarterly.

State here the exact kind of policy desired: ——.

For whose benefit is the insurance desired. (Write names in full and note carefully instructions as to beneficiaries on back hereof.)

Residence of said person or persons.

Relationship to applicant.

Are you now, or have you ever been insured in this society, and for what amount?

Are you now insured, or are you negotiating elsewhere for insurance? If so, state in what companies or organizations, the kinds of policies and their respective amounts.

Are you now, or have you ever been engaged, directly or indirectly, in the sale of wines, spirits or malt liquors?

Has application to grant or restore insurance on your life ever been made which was not complied with in the form and amount asked for?

If so, state every such case, when, and the cause or causes?

I hereby apply to the Provident Savings Life Assurance Society of New York for a policy of insurance, to be issued in accordance with the directions hereof.

It is hereby jointly agreed by myself and all parties in interest, or who shall become interested as follows: That the policy hereby applied for shall not become binding upon the society until the first premium due thereon has been actually received by said society, or its authorized agent, during my lifetime and good health; that I will not, within two years from the date of said policy visit or reside in any place outside the United States, Canada, and that portion of Europe north of 42 parallel of north latitude (except while voyaging in first-class vessels to or from ports in said countries) and that I will
9 not, at any time, personally, engage in blasting, mining, submarine labor, aeronautic ascentions, the manufacture, handling or transportation of highly inflammable or explosive substances, or service upon any vessel, boat or railroad, except upon the written permission of the society in every such case; that self-destruction, whether sane or insane, voluntary or involuntary within two years from the date of said policy, or death resulting from actual or attempted violation of law, are risks not assumed by the society, and that in either such case the liability of the society shall be limited to any stipulated cash surrender value which said policy shall have at the date of death; that the proofs of death required shall be made upon the blank forms furnished by the society, and shall include all the information required thereby; that all provisions of law forbidding any physician who has or shall have attended me from disclosing any and all information which he acquired by such attendance, together with any such provisions affecting the uses which shall be made of this application or any part thereof, are hereby expressly waived, and that the policy issued upon this application, shall, at all times and places be construed to be a contract made in the State of New York. It is hereby further declared and warranted that all the statements and representations contained in part "I" and part "II" of this application, or in any certificate of health hereafter given to the society to secure restoration or reinstatement of said policy, by whomsoever they be written, are material, and are and shall be true, and, with the stipulated premiums shall be the sole consideration of the contract with the society if a policy be issued or renewed thereon; and that if any concealment, or fraudulent or untrue statement or representation be made, or if at any time any covenant or agreement herein made shall be violated, said policy and insurance shall be null and void, and all payments made or accepted thereon shall be forfeited to the society, except as provided therein.

Dated at —— this — day of ——, 189–.

In presence of—

——— ———,

Soliciting Agent.

Approved by—

——— ———,

General Agent.

Signature of the party or parties for whose benefit the insurance is to be effected.

——— ———.
——— ———.

(Write the names in full and observe instructions strictly.)

"NOTE."—In case of husband and wife, or parent and children, the former may sign for the latter, thus:

MARY SMITH,
By JOHN SMITH.

10 Signature of the party on whose life insurance is applied for.

——— ———.

(Write the name in full.)

Copy.

Part "II," Statements to the Medical Examiner.

1. Name? ———.
2. Is your present and usual health sound and good? ———.
Place and date of birth? ———.
3. Have you been successfully vaccinated? ———.
4. If never vaccinated, do you agree that death by smallpox without previous vaccination is a risk not assumed by the society under the policy applied for? ———.
5. Have you ever had spitting of blood, difficult or short breathing, pain in chest, habitual cough or expectoration, or any pulmonary symptom? ———.
6. Have you ever been an inmate of any hospital, or visited any health resort, or changed your residence or occupation on account of your health? Give details. ———.
7. Have you ever used spirits, wine or malt liquor? ———.
8. Have you ever used them to excess? ———.
9. Do you now use them? If so, state definitely what is the form, how much and how often?—*i. e.*—What is your practice? (Don't say "moderately," "temperate," etc. Such answers will not be accepted. See No. 2, on back.)
10. If you have ever used them to excess, give full details of how often and how long since? ———.
11. Are you in the habit of rising at night to void urine? ———.
12. Are you addicted to the use of opium, chloral, or any narcotic, or the excessive use of tobacco? ———.
13. Have you ever been so? ———.
14. If "yes," give full details, which, when, to what extent, etc.? ———.
15. Have you now, or have you ever had any of the following? Answer "yes" or "no" as to each. If "yes" in any case give particulars under 18 below:

Apoplexy.
Asthma.
Bronchitis.
Cancer or tumor.
Colics.
Diabetes.
Disease of brain.
Disease of the heart.
Disease of kidneys.
11 Disease of bladder.
Disease of liver.
Disease of lungs.
Disease of skin.
Disease of spine.
Disease of spleen.
Disease of the sexual organs.
Delerium tremens.
Dizziness or vertigo.
Diarrhœa (chronic).
Dyspepsia.
Epilepsy.
Erysipelas.
Fistula.
Fits or convulsions.
General debility.
Hernia. If so will you always wear a truss?
Gout.
Gravel.
Habitual headache.
Insanity.
Insomnia.
Jaundice.
Neuralgias.
Otorrhœa or otitis.
Palpitation.
Paralysis.
Physical injury.
Piles.
Pleurisy.
Pneumonia.
Rheumatism.
Sciatica.
Sunstroke.
Surgical operation.
Swelled limbs or face.
Scrofula.
Syphilis.
Typhoid fever.
Unconsciousness.
Varicose veins.
Yellow fever.

16. Family history. State the age and present health of each of the following persons, if living. Give age at death and cause of death of each, if deceased. In giving cause of death avoid all indefinite terms, such as "don't know," "childbirth," "fever," "decline," "exposure," "natural death," "complication of diseases," etc.

Father: Living? ——. Age? ——. Health? ——. Dead? ——. Age? ——. Specific cause of death? ——. How long sick? ——. Previous health? ——.

Father's father: Living? ——. Age? ——. Health? ——. Dead? ——. Age? ——. Specific cause of death? ——. How long sick? ——. Previous health? ——.

Father's mother: Living? ——. Age? ——. Health? ——. Dead? ——. Age? ——. Specific cause of death? ——. How long sick? ——. Previous health? ——.

Mother: Living? ——. Age? ——. Health? ——. Dead? ——. Age? ——. Specific cause of death? ——. How long sick? ——. Previous health? ——.

Mother's father: Living? ——. Age? ——. Health? ——. Dead? ——. Age? ——. Specific cause of death? ——. How long sick? ——. Previous health? ——.

Mother's mother: Living? ——. Age? ——. Health? ——. Dead? ——. Age? ——. Specific cause of death? ——. How long sick? ——. Previous health? ——.

How many brothers have you had?

12 Answer, ——. Living ——. Age ——. Health ——. Dead ——. Age ——. Specific cause of death ——. Dead ——. How long sick ——. Previous health ——.

How many sisters have you had?

Ans. ——. Living ——. Age ——. Health ——. Dead ——. Specific cause of death ——. How long sick ——. Previous health ——.

Ans. ——.

17. Have you, or any of your blood relatives ever attempted suicide or been afflicted with consumption, insanity, cancer or any hereditary disease? (Answer fully.) ——.

18. ——.

19. Have you ever had any sickness, injury or infirmity whatever, not already named. If so, state the number of attacks, and the date, location and duration of each. Ans. ——.

20. Give the name and residence of your usual medical attendant. ——.

21. When and by what physician were you last attended and for what complaint? (Answer fully and specifically.) ——.

22. Has application to grant or restore insurance on your life ever been made which was not complied with in the form and amount asked for? If so, state every such case, when, and the cause or causes. ——.

23. Have you ever applied for or received a pension or sick benefits from any government, society or corporation? If so, state fully the reason therefor. ——.

I hereby declare that I have read and understand all the above questions and the answers thereto, and they are hereby made part of my application for insurance by the Provident Savings Life Assurance Society of New York, and I hereby warrant said answers as written, to be true, and that I am the person described above and in part "I" of this application, signed by me.

Witness, —— ——, M. D.

Dated this — day of ——, 189–.

—— ——, Person examined.

(On back of policy is following form.)

$—. NEW YORK, —— —, 18—.

Received from Provident Savings Life Assurance Society of New York — dollars in full for all claims under the within policy,

13 terminated by ——.

—— ——.

Witness —— ——.

TENNESSEE, *Knox County.*

Mary F. McConnell, being duly sworn, says that the allegations made in the foregoing bill are true, according to the best of her knowledge, information and belief.

MARY F. McCON-ELL.

Sworn to and subscribed before me this February 26th, A. D. 1894.

[L. S.] W. W. LEE,
Notary Public.

Exhibit "A."

Subpœna to Answer.

Issued 27th day of Feb'y, 1894. W. A. Galbraith, D. C. M.

STATE OF TENNESSEE:

Chancery court at Knoxville to the sheriff of Knox county, Greeting:

Summon the Provident Savings Life Assurance Society of New York to appear before the chancery court at Knoxville, on or before the first Monday of March next, to answer the original bill which Mary F. McConnell has filed in said court against it, and have you then and there this writ.

Witness W. L. Trent, clerk and master of our said court, at office in Knoxville, this 27th day of February, 1894.

W. L. TRENT,
Clerk and Master,
By W. A. GALBRAITH,
Deputy C. and M.

Notice.

To the above-named defendant:

You are hereby notified that you are required to make defense in this case on or before the first Monday of March next, or judgment *pro confesso* will be entered against you.

W. L. TRENT,
Clerk and Master,
By W. A. GALBRAITH,
Deputy C. & M.

(Endorsed:) Came to hand 27 day of Feb'y, 1894. Executed as commanded and left a copy of the bill with H. M. Aiken, president of the Provident Savings Life Assurance Society of New York, and a copy of this subpœna to answer with adult defendant. February 27, '94. S. W. Jarnagin, D. sheriff.

14 *Petition of Defendant for Removal.*

Filed March 9th, 1894. W. L. Trent, C. & M., by W. A. Galbraith, D. C. M.

In the Chancery Court of Knox County, Tennessee.

MARY F. McCONNELL
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK. } No. 5979.

To the Honorable Henry R. Gibson, chancellor, sitting in chancery court at Knoxville:

Your petitioner, The Provident Savings Life Assurance Society of New York, respectfully shows to this honorable court that the matter and account in dispute in the above-entitled suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

The controversy in said suit is between citizens of different States, and that your petitioner, the defendant in the above-entitled suit, was, at the time of the commencement of the suit, and still is, a resident of and a citizen of the city of New York, county of New York, in the State of New York, and a non-resident of the State of Tennessee, and that the complainant, Mary F. McConnell, was then and still is a resident and citizen of the city of Knoxville, county of Knox and State of Tennessee.

And your petitioner offers herewith a good and sufficient surety for its entering in the circuit court of the United States for the northern division of the eastern district of Tennessee, at Knoxville, Tennessee, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said circuit court shall hold that this suit was wrongfully or improperly removed thereto.

And it prays this honorable court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond, and to cause the record herein to be removed into the said circuit court of the United States in and for the northern division of the eastern district of Tennessee.

And it will ever pray.

TAYLOR & PEPPER,
Solicitors for Petitioner.

15 STATE OF NEW YORK, }
County of New York. }

Sheppard Homans, president of defendant company, The Provident Savings Life Assurance Society of New York, deposes and says that he is president of the above-named petitioner. The foregoing petition is true to his knowledge, except as to the matters therein

stated to be alleged upon information and belief, and as to these matters he believes them to be true.

SHEPPARD HOMANS,
President of Provident Savings Life Assurance Society of New York.

Sworn to and subscribed before me this 3d day of M'ch, '94.
[L. S.] T. H. STEVENS,
Notary Public.

On this, the 3d day of March, 1894, in the city and county of New York, before me, a notary public, in and for the city and county of New York, personally appeared Sheppard Homans, president of the Provident Savings Life Assurance Society of New York, to me known to be the individual, who as president of said defendant company executed the foregoing petition and then and there acknowledged to me that he had executed the same.

[L. S.] T. H. STEVENS,
Notary Public.

Bond for Removal.

Filed March 9th, 1894. W. L. Trent, C. & M., by W. A. Galbraith, D. C. M.

Know all men by these presents, that the Provident Savings Life Assurance Society of New York, and H. H. Taylor and George H. Pepper as sureties, are held and firmly bound unto Mary F. McConnell in the penal sum of one thousand dollars, for the payment whereof well and truly to be made unto the said Mary F. McConnell, her heirs, representatives and assigns, — jointly and severally, firmly by these presents.

Upon condition, nevertheless, that, whereas the Provident Savings Life Assurance Society of New York has petitioned the chancery court of Knoxville, Knox county, Tennessee, for the removal of a certain cause therein pending, wherein the said Mary F. McConnell is complainant and the said Provident Savings Life Assurance Society of New York, is respondent, to the circuit court of the
16 United States in and for the northern division of the eastern district of Tennessee.

Now, if the said Provident Savings Life Assurance Society of New York shall enter into the said circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and virtue.

In witness whereof the said Provident Savings Life Assurance Society of New York and H. H. Taylor and Geo. H. Pepper have hereunto set their hands and seals this 3rd day of March, 1894.

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK,
[SEAL.] By SHEPPARD HOMANS, *President.*
H. H. TAYLOR.
GEORGE H. PEPPER.

STATE OF TENNESSEE, }
Knox County. }

H. H. Taylor and George H. Pepper, each being duly sworn respectively deposes and says, he resides in the city of Knoxville, Knox county and State of Tennessee, and is a freeholder in said State, and that he is worth the sum of two thousand dollars over and above all property exempt from sale on execution.

H. H. TAYLOR.
GEORGE H. PEPPER.

Sworn to and subscribed before me this 9th day of March, 1894.
W. A. GALBRAITH, *D. C. & M.*

On this the 3rd day of March, 1894, in the city and county of New York, before me, a notary public in and for the city and county of New York, personally appeared *before* Sheppard Homans, president of the Provident Savings Life Assurance Society of New York, known to me, and known to me to be the president of said insurance society and who executed for said insurance society the foregoing instrument, and then and there acknowledged that he, as president of said insurance society had executed the foregoing bond.

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK,
[L. S.] By SHEPPARD HOMANS, *President.*

T. H. STEVENS,
[L. S.] *Notary Public.*

17 NEW YORK COUNTY, }
State of New York. }

On this 9th day of March, 1894, in the city of Knoxville, county of Knox and State of Tennessee, before me W. L. Trent, clerk and master of the chancery court of Knox county, Tennessee, personally appeared H. H. Taylor and George H. Pepper, both of whom are to me known and known to me to be the individuals described in, and who executed the foregoing instrument as sureties of said insurance society, and then and there each of them severally acknowledged that he had executed the foregoing bond as such surety.

W. L. TRENT, *C. & M.*,
By W. A. GALBRAITH,
D. C. & M., Clerk and Master Chancery Court of Knox County, Tennessee.

MONDAY, *March 26th*, 1894.

Court met pursuant to adjournment.

Present and presiding: The Honorable Henry R. Gibson, chancellor.

Record of Monday, March 5th, 1894, read approved and signed and the following additional proceedings were had, to wit:

Order for Removal.

MARY F. McCONNELL
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY. } 5979.

The desendant herein, having within the time provided by law, filed its petition and affidavit for the removal of this suit to the circuit court of the United States, for the northern division of the eastern district of Tennessee, and having at the same time, offered good and sufficient security, pursuant to statute; and the court finding that defendant is a resident of the State and city of New York, and that it is entitled to such removal. Said petition (affidavit) and bond are accepted and it is hereby ordered by the court, that this suit be removed for trial into the next circuit court of the United States for the northern division of the eastern *division of the eastern* district of Tennessee, pursuant to the statutes of the United States, and all further proceedings in this court, in this cause, are hereby stayed.

18 *Entries from Rule Docket.*

1894, Feb'y 26.—Bill filed. Pros. bond $250. C. L. McConnell sec't'y file.
Feb. 27.—Copy bill (1,200 w.) and sub. to ans. and copy issued to Knox Co.
Feb. 27.—Sub. to ans. (Knox Co.) executed by S. W. Jarnagin D. S.
M'ch 9.—Petition of defendant to remove cause to Federal ct. filed. Notice.
M'ch 9.—Bond for removal filed.
M'ch 26.—Transferred to Federal court. Y 607.

STATE OF TENNESSEE, } *ss:*
County of Knox, }

I, W. L. Trent, clerk and master of the chancery court of Knoxville, do hereby certify that the foregoing is a full, true and perfect copy of all the papers on file and of record in my office, in the above-entitled cause.

[SEAL.] Given under my hand and seal of said court at office in Knoxville, this 9th day of July, 1894.

W. L. TRENT, *C. & M.*,
By C. M. GALBRAITH.

$4.75. KNOXVILLE, TENN., *July 10th*, 1894.

Received of George H. Pepper, four and seventy-five one-hundredths dollars, cost of transcript in case of Mary F. McConnell *vs.* Provident Savings Life Assurance Society.

W. E. TRENT, *C. and M.*

Answer.

Filed July 9th, '94. H. H. Taylor, cl'k, by J. T. Carter, D. C.

In the Circuit Court of the United States at Knoxville, Tenn., for the Northern Division of the Eastern District of Tennessee.

MARY F. McCONNELL
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

19 The answer of the Provident Savings Life Assurance Society of New York to the bill filed against it in the chancery court of Knox county, Tennessee, and removed to this honorable court.

To the honorable judges holding United States circuit court at Knoxville, Tennessee:

Respondent answering complainant's bill, admits that complainant is the widow of Robert A. McConnell, deceased.

Respondent is informed that about 7 o'clock on the evening or night of July 27th, 1893, while in the State of Kentucky, quite a distance from Knoxville, Tennessee, complainant's intestate Robert A. McConnell, had his leg injured by an engine or car, and that on the 28th day of July, 1893, a surgical operation was performed on said injured leg, from which he died.

Respondent admits that it is a corporation organized under and in accordance with the laws of the State of New York; that it has its principal office and place of business in the city of New York and that H. M. Aiken, formerly president of the Holston National Bank of Knoxville, Tennessee, was for a time its local agent for said city of Knoxville, Tennessee; and that the Holston National bank was its collecting agent in and for said city.

Respondent further admits, that on April 27th, 1893, Robert A. McConnell applied for and received insurance on his life in respondent society, said policy of insurance being number 52941 and for the sum of $5,000; same was made payable,—provided certain provisions hereinafter mentioned were complied with—to complainant, Mary F. McConnell, (at the death of Robert A. McConnell).

Complainant's intestate took out, or had issued to him, what is known as "the yearly renewable policy," which is issued at a very low rate of premium and renewable from year to year during life, without medical re-examination or any other requirement, other than the payment of the premium, annually, semi-annually or quarterly when due. "The yearly renewable policy" is only written for one year at a fixed rate, but can be renewed from year to year at a slight advance in premium; as a man grows older, the risk of dying increases, so the renewal premium necessarily increases slightly each year. For example: At the age of 31 years, and annual premium for $5,000 is $76.25. At the age of 32 years, on the same amount,

it is $77.50 and so on, increasing slightly as the insured grows older and as the risk becomes greater.

The premium for the running or current year is always due in evidence, but for the accommodation and convenience of its policy-holders, this respondent allows premiums to be paid by quarterly or semi-annual installments or payments, with the express undertaking in its policy, (under the head of stipulations and agreements) that "failure to pay any premium or semi-annual or quarterly installment thereof, when due, will thereupon terminate this policy."

Complainant's intestate elected to pay his premium quarterly, and on the 27th day of April, 1893, paid $20.65, being the premium for the first quarter, and insuring his life, to the 27th day of July, 1893. The receipt given him for said quarterly premium, shows upon its face, that $20.65 has been paid on policy No. 52941, insuring $5,000 on the life of Robert A. McConnell to the 27th day of July, 1893, and no longer, copy of which receipt is herewith filed marked Exhibit "A" and prayed to be taken as part of this answer.

Respondent denies emphatically, that the $20.65 was paid on account of premium for the first year, as charged in the bill, and avers that it was in full for the first quarter, as shown by the receipt herewith filed, marked Exhibit "A."

Respondent respectfully shows unto your honors that the second quarterly installment or premium was due and payable on or before the 27th day of July, 1893, and that in accordance with the laws of the State of New York, (under which this respondent has its charter and under which it is doing business and which the parties mutually agreed should govern this contract of insurance) which requires that not less than 15 or more than 45 days' notice be given the insured, by mailing same a written or printed notice, to his or her last known address, postage paid, stating in said notice when premium will be due, giving amount and warning the insured that if same is not paid on or before said date, at which it becomes due, that the policy and all payments made thereon will become forfeited and void.

Respondent further shows unto your honors that on the 19th day of June, 1893, a notice was mailed in the city of New York, addressed to Robert A. McConnell, box 36, Knoxville, Tennessee, giving him notice that a premium of $20.65, required to renew policy 52941, became due on the 27th day of July, 1893, and that unless said premium is paid on or before said date, the policy and all payments made thereon will become forfeited and void; copy of said notice is herewith filed marked Exhibit "B" and prayed to be taken as part of this answer, for the purpose of showing that every precaution was taken in regard to giving the insured notice, and that the New York law was complied with.

Respondent further shows unto your honors that on July 27th, 1893, the day upon which the second quarterly payment became due and payable upon policy No. 52941 on the life of Robert A.

McConnell, respondent's collecting agent, the Holston Na-
21 tional bank, through its collector, Frank Scott, in consequence of instructions from respondent, called at the office of Robert A. McConnell for the purpose of receiving and receipting for the $20.65 necessary to renew and keep alive policy No. 52941 on the life of Robert A. McConnell for the second quarter, ending the 27th day of October, 1893. Respondent's collecting agent, Frank Scott, was informed by Robert A. McConnell's representative in office (Miss Vestal) that Robert A. McConnell was not in the city or State, but in the State of Kentucky. Respondent's collector thereupon demanded payment of the premium upon said policy of the said representative of Robert A. McConnell, which she declined to pay.

Respondent is informed that late in the afternoon or night of July 27th, 1893, and after there had been a failure to pay said premium and a forfeiture of said policy, Robert A. McConnell received injuries upon his leg, from an engine or car, and that on the next day, to wit, on the 28th day of July, 1893, a surgical operation was performed upon said injured leg, from which he lived a few hours and died.

Complainant in her bill quotes from this respondent's policy as follows: "The Provident Savings Life Assurance Society of New York, in consideration of the 'stipulations and agreements' in the application herefor, and upon the next page of this policy, all of which are a part of this contract, and in consideration also of the payment of seventy-six dollars and twenty-five cents, being the premium herein for the first year, promises to pay to Mary E. McConnell, wife of Robert A. McConnell, or to her legal representatives or assigns, the sum of five thousand dollars (less any indebtedness on account of this policy) within sixty days after acceptance at the office of the society in the city of New York, of satisfactory proof of the death of Robert A. McConnell of Knoxville, county of Knox, and State of Tennessee (the insured upon this policy) provided such death shall occur on or before the 27th day of April, A. D. 1894."

Respondent denies that said quotation applies to the question, or questions involved in this case, but says that it applies to cases where the premium had been paid, and where the policy has been kept alive and is in force at the time of the death of the insured. Respondent avers that the only agreement in said policy applicable to cases where the premiums are paid quarterly or semi-annually and where said quarterly or semi-annual premiums are not paid when due and payable is under the head of "stipulations and agreements" on the second page of said policy, and which is a part of the agreement, as shown on the face of the policy, and which reads as fol-
22 lows: "The annual premium on this policy may be paid by quarterly installments, as hereinafter stated on or before the 27th days of April, July, October and January in each year. Failure to pay any premium or semi-annual or quarterly installment thereof when due, will thereupon terminate this policy."

"Any unpaid quarterly or semi-annual installments of the current year's premium, and any other indebtedness to the society will be

deducted in any settlement of this policy," all of which means simply, that while the whole year's premium is due in advance, that for the accommodation and convenience of policy-holders who prefer to pay their premiums quarterly or semi-annually, the society agrees, upon the one hand, to allow them that privilege, the insured agreeing, upon the other hand, for that privilege, to pay their premiums on or before the day upon which they become due and payable, with the full understanding and agreement that if they fail or neglect so to do, that the policy is thereupon to terminate and become null and void.

"Any unpaid quarterly or semi-annual installments of the current year's premium, or any other indebtedness to the society will be deducted in any settlement of this policy," means simply, that the premium of the "yearly renewable policy," like all other insurance, is due in advance, but which premium, for the accommodation and convenience of policy-holders, respondent allows its policy-holders to pay by quarterly or semi-annual installments, with the express understanding that if the insured dies during any quarter or half of the current year, with his insurance paid for that quarter or half, that the remaining quarter or quarters or semi-annual premium or premiums for the current year will be subtracted from the full amount of the policy (the whole year's premiums being due in advance).

Respondent again shows unto your honors that complainant's intestate had only paid $20.65 into the society, being the first premium necessary to insure and keep alive the policy on his life for the first quarter, commencing April 27th, 1893, and running to July 27th, 1893, and that on or before said 27th day of July, 1893, the second quarterly premium became due and payable, and that although complainant's intestate had due notice that said policy would lapse and become null and void if said premium was not paid on or before said 27th day of July, 1893, that he disregarded said notice and allowed said policy to lapse, and, at the time of his death, to wit, on the 28th day of July, 1893, his life was not insured in respondent society.

Respondent denies that it owes complainant $5,000.00 less the three unpaid quarterly premiums, or any other amount, and avers
23 that at the time of his death, to wit, on the 28th day of July, 1893, Robert A. McConnell was not insured in respondent society, but that his policy had lapsed on the 27th day of July, and that he knew and was bound to have known, by reading the "stipulations and agreements" which were embodied in and a part of the contract—by reading the receipt for the first quarterly premium, copy of which is Exhibit "A" to this answer—by reading the notice mailed to him June 19th, 1893, in New York P. O., copy of which is Exhibit "B" to this answer, that his policy would lapse and become null and void, if he failed or neglected to pay his quarterly premium at or before the time it became due and payable.

And respondent avers that said policy No. 52911, on the life of Robert A. McConnell lapsed on the 27th day of July, 1893, from the failure of complainant's intestate to pay the second quarterly premium on same, which became due on or before July 27th, 1893.

All allegations in complainant's bill not admitted or denied, are hereby expressly denied.

Respondent denies that it owes complainant anything on account of said lapsed policy and prays to be hence dismissed with its reasonable costs.

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK,
By SHEPPARD HOMANS, *President.*

GEORGE H. PEPPER, *Solicitor.*
EDWIN B. SMITH, *Of Counsel.*

STATE OF NEW YORK, }
County of New York, } *ss:*

Personally appeared before me the undersigned authority, Sheppard Homans, president of the Provident Savings Life Assurance Society of New York, and made oath in due form of law that the statements made in the foregoing answer are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this 22nd day of May, 1894.

[SEAL.] T. H. STEVENS,
N. P., Kings Co.

Cert'e filed in New York Co.

(Copy.)

EXHIBIT "A."

The Provident Savings Life Assurance Society of New York.

24 Received from Mary F. McConnell, twenty and $\frac{65}{100}$ dollars, being the first premium required on policy No. 52941, insuring five thousand dollars on the life of Robert A. McConnell to the 27th day of July, 1893.

Dated April 27th, 1893.

—— ——, *Secretary.*

(Copy.)

EXHIBIT "B."

Provident Savings Life Assurance Society of N. Y., Columbia building, No. 29 Broadway.

NEW YORK, *June 19th,* 1893.

Take notice that a premium of $20.65 required to renew policy 52941 in this society will, if such policy be in force on that day, but not otherwise, become due and payable to the secretary of the society at its office, No. 29 Broadway in the city of New York on the 27th day of July, 1893, and unless said premium shall be paid on or before said date, the policy and all payments made thereon will become forfeited and void; but this notice is not intended to affect any right to paid-up or extended insurance provided for in the policy contract.

All premiums are due at the office of the society in the city of New York, but for the convenience of policy-holders, payments may be made on or before due dates to any authorized agent having in his possession the society's receipts therefor, signed by the president or secretary.

Should you change your post-office address, notify the secretary of the society in writing without fail.

WM. E. STEVENS, *Secretary.*

Agreement as to Facts.

Filed July 21st, 1894. H. H. Taylor clerk.

MARY F. MCCONNELL
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK. } No. —.

25 In the United States Circuit Court for the Northern Division of the Eastern District of the State of Tennessee.

For the purpose of saving time and expense, and expediting the trial of this cause, the following facts are agreed upon between the parties, and as such may be taken and considered by tbe court in the determination of this lawsuit, so far as the facts themselves are competent, as fully as though established by competent testimony in regular form taken and submitted.

I.

That the policy sued on and exhibited with complainant's bill, including the application made part thereof, is the contract of insurance between the parties.

II.

That the payment of twenty and $\frac{65}{100}$ dollars, made at the issuance and delivery of the policy sued on, is all of the premium that was ever paid on the policy, that the receipt (if it be a receipt) therefor, a true copy of which is exhibited with the answer of the defendant company, was delivered to R. A. McConnell, the insured, but was never given by him to the complainant, Mary F. McConnell, who never saw or knew of its existence until after the death of R. A. McConnell, but that she did know of his having insured his life in defendant company, the policy having been shown to and handed her by the insured.

III.

That the notice of premium on policy due on July 27th, 1893, a true copy of which is exhibited with the answer of the defendant society, was regularly mailed by the defendant society of New York to the said R. A. McConnell, at Knoxville, Tennessee, on June 19th, 1893, and in the due course of mail arrived at Knoxville and was

delivered at the business office of R. A. McConnell, who, being absent from the city at the time, never saw the notice, the same having by oversight been taken from his office by his father, T. G. McConnell, and carried by him to his home in the State of Virginia, and which he did not return until within the past two months.

IV.

That the paper-writing filed as Exhibit "A" to the answer of the defendant assurance society is a true copy of the only receipt
26 (if it be a receipt) except such a receipt (if it be a receipt) as appears upon the face of the policy sued on, itself, ever executed by the defendant for any payment made of the premium on the policy in controversy.

V.

That on July 27th, 1893, the defendant assurance society, by its duly authorized collector, made demand at the business place of R. A. McConnell, in the city of Knoxville, for the payment of premium on said policy, maturing on that date, of Miss Vestal, the then stenographer of said R. A. McConnell (the said R. A. McConnell himself being out of the city and in the State of Kentucky on that date) and notwithstanding said demand for its payment, the same was not paid.

No notice of any premium being due was ever given to the complainant, Mary F. McConnell, nor was any demand ever made upon her for the premium on said policy.

VI.

That proofs of the death of R. A. McConnell, the insured were made out in due form on blanks furnished by the defendant for that purpose, and were forwarded to and received by the defendant company on September 25th, 1893, and demand made on behalf of the beneficiary, Mary F. McConnell for the payment of said policy, which was refused by the defendant assurance society.

Formal application to defendant's answer is waived.

This July 16th, 1894.

MARY F. McCONNELL, *Complainant*,
By R. H. SAMSOM, *Attorney*.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK,
By GEROGE H. PEPPER, *Solicitor*.

Stipulation Waiving Trial by Jury.

Filed July 21st, 1894. H. H. Taylor, clerk.

In the United States Circuit Court for the Northern Division of the Eastern District of the State of Tennessee.

MARY F. MCCONNELL
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK. } No. —.

27 It is hereby stipulated by and between the parties hereto, and their attorneys that this cause be tried by the court without a jury, a jury trial being hereby waived under sections 649 and 700 of the Revised Statutes of the United States.

MARY F. McCONNELL, *Compl't,*
By R. H. SANSOM, *Att'y.*
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK,
By GEORGE H. PEPPER, *Attorney.*

(Copy.)

Application to the Provident Savings Life Assurance Society of New York.

Part I.

Full name of applicant whose life is offered for insurance. Robert Abram McConnell.

Residence of applicant. Knoxville, Knox Co., Tennessee.

Specific occupation. Lumberman.

(If clerk, merchant, manufacturer or mechanic, state definitely the goods handled.)

Where shall notices of premiums be addressed? Box 36, Knoxville, Tennessee.

Place of birth. Town, Abingdon; county, Washington; State, Va.

Date of birth. Year, 1862; month, July; day, 13th; age at nearest birthday, 31.

Are you married? Yes.

What cash installment has been paid to make the policy under this application binding from this date, providing the risk is assumed by the society? A — annual payment of $— has been paid upon condition that if the risk is not assumed by the society, this sum is to be returned in accordance with the provisions of the society's official binding receipt No. — given as a voucher for said payment.

Note here (not in an accompanying letter) any special clause or provision desired in policy.

Face of policy to be paid at death to Mary F. McConnell.
Amount of policy applied for, $5,000.
Premiums payable, { Annually. (Erased.) / Semi-annually. (Erased.) / Quarterly.
(Erase except as desired.)
State here the exact kind of policy desired. S. R. T.

For whose benefit is the insurance desired? (Write name
28 in full and note carefully instructions as to beneficiaries on back hereof.) Mary F. McConnell or heirs.
Residence of said person or persons? Knoxville.
Relationship to applicant? Wife.

Are you now, or have you ever been insured in this society, and for what amount? No.

Are you now insured or are you negotiating elsewhere for insurance? If so, state in what companies or organizations, the kinds of policies, and their respective amounts? No.

Are you now, or have you ever been engaged directly or indirectly in the sale of wines, spirits or malt liquors? No.

Has application to grant or restore insurance on your life ever been made, which was not complied with in the form and amount asked for? If so, state every such case, when, and the cause or causes? No.

I hereby apply to the Provident Savings Life Assurance Society of N. Y. for a policy of insurance, to be issued in accordance with the directions hereof.

It is hereby jointly agreed by myself and all parties in interest, or who shall become interested, as follows: That the policy hereby applied for shall not become binding upon the society until the first premium due thereon has been actually received by said society, or its authorized agent during my lifetime and good health; that I will not within two years from the date of said policy, visit or reside in any place outside the United States, Canada, and that portion of Europe north of the forty-second parallel of north latitude (except while voyaging in first-class vessels to or from ports in said countries) and that I will not at any time, personally engage in blasting, mining, submarine labor, aeronautic ascensions, the manufacture, handling or transportation of highly inflammable or explosive substances, or service upon any vessel, boat or railroad, except upon the written permission of the society, in every such case; that self-destruction, whether sane or insane, voluntary or involuntary, within two years from the date of said policy, or death resulting from actual or attempted violation of law, are risks not assumed by the society, and that in either such case the liability of the society shall be limited to any stipulated cash surrender value, which said policy shall have at the date of death; that the proofs of death required shall be made upon the blank forms furnished by the society, and shall include all the information required thereby, that all provisions of law forbidding any physician who has or shall have attended me from disclosing any and all information which he acquired by such attendance, together with any such provisions affect-

ing the uses which shall be made of this application or any part thereof, are hereby expressly waived, and that the policy
29 issued upon this application shall at all times and places be construed to be a contract made in the State of New York. It is hereby further declared and warranted, that all the statements and representations contained in part I and part II of this application or in any certificate of health hereafter given to the society to secure restoration or reinstatement of said policy, by whomsoever they may be written, are material, and are and shall be true and with the stipulated premiums shall be the sole consideration of the contract with the society if a policy be issued or renewed thereon; and that if any concealment, or fraudulent or untrue statement or representation be made, or if at any time any covenant or agreement herein made shall be violated, said policy and insurance shall be null and void, and all payments made or accepted thereon shall be forfeited to the society, except as provided therein.

Dated at Knoxville, this 29th day of April, 1893.

In presence of—
H. M. AIKENS,
Soliciting Agent.

Approved by account—
S. W. AND B.,
General Agent.

Examined by—
——— ———,
Medical Examiner.

Signature of the party or parties for whose benefit the insurance is to be affected.
(Write the name in full and observe instructions strictly.)
MARY F. McCONNELL.

NOTE.—In case of husband and wife, or parent and children, the former may sign for the latter thus:
MARY SMITH,
By JOHN SMITH.

Signature of the party on whose life insurance is applied for.
ROBERT A. McCONNELL.

(Following endorsed on back of application:)

Special Notice to Agents.

It will be noted that *in* parts II and III (the medical examiner's report) are upon a separate sheet, and must be transmitted by the examiner direct to the home office. It is suggested that agents should leave with all regular examiners, for their use, a small supply of the blank parts II and III, also keeping with them a supply for use in case those of the examiner are mislaid. The attention of the examiner may be called to the instructions on his blanks, and

particularly to the request that the report be forwarded by first mail after the examination is complete, that thereby delay in the society's action may be avoided.

Agents are earnestly cautioned to see that every question in part I, is fully, clearly and explicitly answered, and that all
30 vague and general replies are avoided, and to urge similar caution by the examiner, to whom part I must be submitted in every instance. In this way only can prompt action be secured and the interests of all concerned promoted.

Special attention is called to the following rules regarding beneficiaries, as the society will not issue policies except in strict conformity thereto.

If the policy is desired to be in favor of either a wife, child, father, mother, brother, sister, or legal adopted child (and no others) such beneficiary's name may be signed by the person whose life is to be insured; but in such case the signature must be stated to be "by" such person, as shown in the blanks, and the person to be insured must sign again for himself on the lower line as indicated.

If the beneficiary is to be a creditor, the creditor must himself personally sign upon the upper line and the insured must sign upon the lower.

If the insurance is desired in favor of any other person than those named above, the application must be for a policy in favor of the legal representatives or assigns of the assured, and an assignment of the policy if issued, can be made afterwards.

Be particular to see that the kind of policy is clearly designated.

If more than one policy is desired under one medical examination, use a separate part I, for each policy and see that each is signed in the manner required for that particular policy.

Application to the Provident Savings Life Assurance Society of New York.

Part II, statements to the medical examiner.

Suggestions—Note carefully.

1. Classification of risks. In giving an opinion on life, it is desirable that there should be a uniformity in the expressions used by examining physicians to enable the society to understand and appreciate correctly the opinion they intend to convey. It is therefore suggested that there be expressions used for three grades of risks, as class "A," class "B" and class "C," or perfect, passable, poor.

Class "A" will embrace all those in perfect health, who have never had any serious illness, of good habits and healthy avocations, and of whom there is no cause to suspect any hereditary predisposition to disease.

Class "B," those who have had serious constitutional sick-
31 ness, but have apparently recovered; those in whom hereditary taints may be suspected, though not particularly indicated,

and those who are subject to disease not of a very fatal character, as rheumatism, asthma, etc.

Class "C" will include those who, from any cause, have impaired health or are hereditarily disposed to pulmonary or other diseases, or whose health is affected by their occupation, and those of intemperate habits.

2. In reference to the personal use of liquors, such phrases as "temperate," "drink when I want to," "moderately," "occasionally," etc., give no real information, and are worthless for the purpose of this inquiry. The applicant must state specifically what he commonly drinks, how much and how often. In reporting excess or overindulgence, since the line must be drawn somewhere, let it be at Antie's limit of a daily equivalent of one and a half ounces of pure alcohol represented by three ounces of ardent spirits, two wineglasses of strong wine, a pint of claret, champagne or light wine, three tumblers of strong ale or porter, or four or five tumblers of light ale or beer.

3. Let the physical examination be thorough and exhaustive, no matter how sound the subject may appear, nor how well you may know him. For this purpose insist upon such disrobing as in your discretion the circumstances of each case may require.

4. Should you decline to examine an applicant do not fail to write the fact at once and confidentially to the medical officer, giving name, date of birth and residence of the subject, date of application, and reasons for disapproval. This courtesy will be appreciated.

5. The medical examiners of this society are officers regularly commissioned in the society's service. They are selected and appointed exclusively by the society's medical department through its own channels. Local agents have no concern whatever in the premises; neither in the procuring of appointments, nor even in the making of original nominations for vacant examinerships, except by courtesy. Examiners will therefore understand that they hold office from the medical and not from the agency department of the society, and that they are consequently responsible to the medical department only. Agents are not authorized to direct examiners concerning their duties, but examinations should be made promptly. Delay may lose a good risk and cost the agent his well-earned commission.

1. Name. Robert A. McConnell.
2. Is your present and usual health sound and good? Yes.
3. Have you been successfully vaccinated? Yes.

4. If never vaccinated, do you agree that death by small-
32 pox, without previous vaccination is a risk not assumed by the society under the policy applied for? —.

5. Place and date of birth? Abington, Va., July 13th, 1862.

5. Have you ever had spitting of blood, difficult or short breathing, pain in chest, habitual cough or expectoration, or any pulmonary symptom? No.

6. Have you ever been an inmate of any hospital, or visited any

health resort, or changed your residence or occupation on account of your health? Give details. No.

7. Have you ever used spirits, wine or malt liquor? No.

8. Have you ever used them to excess? No.

9. Do you now use them? If so, state definitely what is the form, how much and how often—*i. e.*—What is your practice? (Don't say "moderately," "temperate," etc. Such answers will not be accepted. See No. 2, on back.) No.

10. If you have ever used them to excess, give full details of how often and how long since? Never used them.

11. Are you in the habit of rising at night to void urine? No.

12. Are you addicted to the use of opium, chloral, or any narcotic, or the excessive use of tobacco? Smoke occasionally.

13. Have you ever been so? No.

14. If "yes," give full details, which, when, to what extent, etc.? —.

15. Have you now, or have you ever had any of the following? Answer "yes" or "no" as to each. If "yes" in any case give particulars under 18 below:

Apoplexy. No.
Asthma. No.
Bronchitis. No.
Cancer or tumor. No.
Colics. No.
Diabetes. No.
Disease of brain. No.
Disease of the heart. No.
Disease of kidneys. No.
Disease of bladder. No.
Disease of liver. No.
Disease of lungs. No.
Disease of skin. No.
Disease of spine. No.
Disease of spleen. No.
Disease of sexual organs. No.
Delerium tremens. No.
Dizziness or vertigo. No.
Diarrhœa (chronic). No.
33 Dyspepsia. No.
Epilepsy. No.
Erysipelas. No.
Fistula. No.
Fits or convulsions. No.
General debility. No.
Hernia. If so will you always wear a truss? —.
Gout. No.
Gravel. No.
Habitual headache. Yes.
Insanity. No.
Insomnia. No.
Jaundice. No.
Neuralgias. No.
Otorrhœa or Otitis. No.
Palpitation. No.
Paralysis. No.
Physical injury. No.
Piles. Yes.
Pleurisy. No.
Pneumonia. No.
Rheumatism. No.
Sciatica. No.
Sunstroke. No.
Surgical operation. No.
Swelled limbs or face. No.
Scrofula. No.
Syphilis. No.
Typhoid fever. No.
Unconsciousness. No.
Varicose veins. No.
Yellow fever. No.

16. Family history. State the age and present health of each of the following persons, if living. Give age at death and cause of death of each, if deceased. In giving cause of death avoid all in-

definite terms, such as "don't know," "childbirth," "fever," "decline," "exposure," "natural death," "complication of diseases," etc.

Father: Living: Age? 70. Health? Good.

Father's father: Dead, Age 60. Specific cause of death? Don't know.

Father's mother: Dead aged 90. Specific cause of death? Don't know.

Mother: Living? Age 60. Health good.

Mother's father: Dead age 88. Specific cause of death? Fever of some character. How long sick? Two months. Previous health good.

Mother's mother: Dead, age 70. Specific cause of death? Don't know. How long sick? Don't know. Previous health good.

How many brothers have you had? One. Living? Age 27. Health good.

How many sisters have you had? Seven.

Living, age 36, health good:

Living, age 29, health good 5;

All died under five years of age. Infant trouble.

17. Have you, or any of your blood relatives ever attempted suicide or been afflicted with consumption, insanity, cancer or any hereditary disease? (Answer fully.) No.

18. Habitual headache, (sick headache) none for two mont-s. Piles cured one year ago. No appearance since.

19. Have you ever had any sickness, injury or infirmity whatever, not already named. If so, state the number of attacks, and the date, location and duration of each. Ans. Nothing except diseases common to childhood.

20. Give the name and residence of your usual medical attendant. Dr. W. L. McCreary, Knoxville, Tennessee.

21. When and by what physician were you last attended and for what complaint? (Answer fully and specifically.) La Grippe, two years ago. Dr. McCreary.

34 22. Has application to grant or restore insurance on your life ever been made which was not complied with in the form and amount asked for? If so, state every such case, when, and the cause or causes. No.

23. Have you ever applied for or received a pension or sick benefits from any government, society or corporation? If so, state fully the reason therefor. No.

I hereby declare that I have read and understand all the above questions and the answers thereto, and they are hereby made part of my application for insurance by the Provident Savings Life Assurance Society of New York, and I hereby warrant said answers as written, to be true, and that I am the person described above and in part "I" of this application, signed by me.

Dated, this 27 day of April, 1893.

ROBERT A. McCONNELL,
Person Examined.

Witness:
C. E. RISTINE, M. D.

24. How long have you personally known the applicant? One year.

25. Does the applicant's appearance indicate good health? Yes.

26. Age 31, height 5 feet 11 inches, weight 180 pounds, number of inches around the chest under the vest on deep expiration 33 inches, on full inspiration 38 inches. Has applicant's weight recently increased or decreased? No.

If so, which and how much? None.

Girth of abdomen? 33 inches.

Q. Did you weigh and measure him? Measured, did not weight.

If not, are you satisfied the above figures are correct? Yes.

27. What is your opinion as to occupation? Healthy. Race, Caucasian. Face color? Dark. Eyes, grey. Hair, dark.

28. Do you consider him acclimated? Yes.

29. What is your opinion in regard to his place of residence? Healthy.

30. What is your opinion as to the effect upon his constitution of any former injury or sickness? None.

31. What is his general physical confirmation? Perfect.

32. Are his statements in part II as to the use of stimulants or narcotics, in your opinion complete and truthful? Yes.

33. What is your opinion as to the effect of his use of stimulants or narcotics upon his constitution? None.

34. Are the brain and nervous system entirely free from tendency to or indications of disease? Yes.

35 35. Are the respiratory organs (lungs, pleura, larynx, etc.,) free from any indications of disease? Yes.

36. Is the respiration full, easy and regular? Yes.

37. Are the heart and blood vessels free from any indications of disease? Yes.

38. Is the heart normal in its sounds, size and location? Yes.

39. Number of respirations per minute? 17.

40. Rate of pulse? (Full minute) 62.

41. Is the pulse-beat normal, intermitting, irregular or unsteady (specify which)? Normal.

42. Is the applicant in the full possession of his five special senses? Yes.

43. Is he free from any natural or other infirmity or deformity? Yes.

44. Is the urinary analysis given below, made from a specimen passed by the applicant in your presence? Yes.

45. Urinary analysis: Color, light straw. Reaction, acid. Specific gravity, 10, 20; albumen, none. Sugar, none. Abnormal deposits, none.

46. Do you unqualifiedly recommend the risk? Yes.

47. Under the classification, given on the opposite page, how do you consider the party? Class "A."

48. Was the examination made in private and with no person present except yourself and the applicant? Yes.

I hereby declare that I have this day carefully examined the above-named person, being the same person described in parts I

and II of this application; that I have attentively considered the statements made by him therein, and have myself written those in part 2, and seen him write his signature thereto.

Examined at Knoxville, Tennessee, the 27th day of April, 1893.

C. E. RISTINE, M. D.,
Medical Examiner for the Society.

(If not medical examiner of the society erase above statement and send in with this application the society's medical certificate, filled out in your own handwriting.)

Additional remarks: (Do not hesitate to make them.)

Under this head the examining physician is requested to explain any of the answers, where space did not permit, and make such other memoranda as he may deem necessary to a full understanding of the case. "Don't know," "childbirth," "fever," "fair," "exposure," "natural death," "complication of diseases," etc., as answers to any question, will not be accepted without explanation by the medical examiner, and "drink when I want to," 36 "occasionally," "moderately," "temperately," and other indefinite answers as to the use of liquors will not be accepted in any case.

Medical examiner's space for additional remarks:

.....

Mail examination direct: When the examination is completed, the application, part I, having been read by the examiner, is to be returned to the agent, and this paper is not to be shown to any one, but is to be immediately mailed by the examiner to the medical director at the home office. Do not fail to read carefully the other side of this sheet.

(Endorsed on back as follows:)

These spaces are for the exclusive use of the home office, and must not be filled or used.

Policy No. —.
App. ——: Ex. ——: Ins. ——: ——:
Amount, $—.
Date of policy, — day of ——, 189–.
Life of —— ——.
Residence, ——.
Ben-fit of —— ——.
Relationship, ——.
Age, ——. Date of birth, —— —, 18—.
Kind, ——. Form, ——.
Ann. *M*rem., $—.
—— Equiv. ——. $—.
Rem. ——.
Approved for ——. —— ——, M. D.
Declined ——.

Date, —— —, 189–.

Reg. In. S. R. T. Ad. Dr.
Rec'd. —— —, ——. Written.

Bill of Exceptions.

Filed July 28, 1894. J. T. Carter, dep. clerk.

MARY F. McCONNELL
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK. } No. —.

On the trial of this cause a jury was waived (copy stipulation), the complainant read the bill and exhibit thereto.

(Copy same.)

37 The defendant read the answer and exhibits thereto.

(Copy same.)

The complainant read the agreed statement of facts filed July 21st, 1894.

(Copy same.)

And defendant read copy of application filed July 23d, 1894.

(Copy same.)

This was all the evidence introduced or considered in the hearing and determination of the cause.

The defendant requested the court to make findings of fact and rulings in matter of law as follows:

(Set out same.)

Upon such request the court found as follows:

(Set out same.)

Complainant moved to set aside the findings of fact and law as follows:

(Copy motion and judgment on same.)

Thereupon the court proceeded to pronounce judgment in favor of defendant, and that complainant's bill be dismissed and for costs,

(Copy final decree)

to which action of the court in the matter of the special findings of fact, and the rulings of law, and the dismissal of said cause of action, the complainant excepts, and tenders this, her bill of exceptions, which is ordered to be signed and sealed and made a part of the record in the cause.

This July 27th, 1894.

D. M. KEY, *Judge.*

Order.

Entered, Journal "U," p. 385, July 4th, 1894. H. H. Taylor, cl'k.

Be it remembered, that at a circuit court of the United States began and held for the northern division of the eastern district of Tennessee, at the court-house in the city of Knoxville, within said district and the sixth circuit, on the 2d Monday, it being the 9th day, of July, A. D. 1894—

Present and presiding, the Honorable D. M. Key, judge, etc.—
The following proceedings were had, to wit:

38 MARY F. McCONNELL
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

Came the Provident Savings Life Assurance Society of New York, by its solicitor, George H. Pepper, and moved the court to allow the transcript in the above-entitled cause from the chancery court of Knox county removed to this court, on bond and petition to be filed in this court. And it appearing to the court that the law in regard to removals has in all things been complied with, the court is pleased to sustain said motion and order that the same be filed and docketed.

Motion to Set Aside Special Finding of Facts Made by the Court.

SATURDAY MORNING, *July 28th*, '94.

Court met pursuant to adjournment.

Present and presiding the Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

MARY F. McCONNELL
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

The complainant, by her counsel, comes and moves the court to set aside and vacate the special findings of fact made by the court herein upon the grounds:

(1.) That the facts are agreed upon by stipulation, of the parties and the matters submitted to the court for its determination upon said agreed state of facts are purely the questions of law involved.

(2.) That where the facts have been determined by stipulation of counsel, it is not competent for the defendant to require special findings under number 649 and number 700 of the Revised Statutes of the United States.

(3.) That the special findings of the court are not sustained by the agreed statement of facts.

(4.) That the conclusion as matter of law upon the agreed statement of facts that the complainant cannot recover, is erroneous.

39 And said motion having been considered by the court, it is ordered that the same be overruled and disallowed, to which action of the court, complainant, by her counsel, excepts.

MARY F. McCONNELL
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

Be it remembered that this cause came on for final hearing before the Honorable D. M. Key, judge of the United States district

court, holding the United States circuit court at Knoxville, Tennessee, on this the 28th day of July, 1894, upon the pleadings and agreed state of facts, with the exhibits to said agreed state of facts, including application for insurance and the policy issued thereon and exhibits with bill and answer, and the same having been considered by the court, and the court being of the opinion that the complainant is not entitled to relief, the court is pleased to order that the complainant's bill be dismissed and the defendant have and recover of and from complainant and C. L. McConnell, surety upon the prosecution bond, the costs of this cause, for which execution is awarded.

Respondent's Request for Findings of Fact and Rulings in Matters of Law.

Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

Before Honorable D. M. Key, judge.

MARY F. McCONNELL
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

A jury having been waived in writing, and the above-entitled cause submitted to the court, under sections 643 and 700 of the Revised Statutes of the United States, the above-named defendant hereby requests the court to make the following findings of fact and rulings in matters of law therein, viz:

40 I.

Under the agreement of the contracting parties, the policy in suit (in all its parts) is, as matter of law, to be taken and considered as a New York contract, and is to be construed in accordance with the statutes and law of that State relating to the subject-matter.

This court takes judicial cognizance of the law and statutes of New York, relating to contracts and to insurance policies of the form of the one upon which this suit is based.

III.

When Robert A. McConnell applied for this policy he had the right to elect whether he would ask to become insured under it for a year, upon payment of the premium of $76.25 in advance, or by so paying quarterly installments of $20.65 each, upon the terms and conditions prescribed in the policy.

IV.

Upon making his application therefore, and when he was offered and accepted the policy in suit. Robert A. McConnell elected and

agreed to become insured thereby upon quarterly advance payments (of $20.65 each) of premium upon the days therein designated for the payment of such installments, and subject to the terms and conditions of the policy.

V.

The dates designated for the payment of the quarterly installments of $20.65 each, and the payment of each installment upon its designated date (if Mr. McConnell should be then living) were of the essence of this contract of insurance, in relation to the matter of its continuance in force.

VI.

As a matter of fact, the first installment of $20.65 paid upon the delivery of the policy to the applicant, is the only sum ever paid under, or in consideration of, said policy.

VII.

In fact the second ($20.65) installment, accruing, July 27th, 1893, never was paid to the defendant.

VIII.

No law required any notice to be given by the defendant of the date when any premium or installment would become due and must be paid, if the insured desired to continue the policy in force—nor of the place or manner of payment.

41 IX.

The defendant did mail to the last-known post-office address of Robert A. McConnell, the notice of the sum of $20.65 falling due and payable July 27th, 1893, if the policy was to be kept in force, provided for by the statutes of New York.

X.

No law required any notice to be given the complainant Mary F. McConnell of the time, place or manner of payment of any premium or installment payable under the terms of said policy to keep the same in force.

XI.

The failure to pay the installment ($20.65) payable July 27th, 1893, and necessary to be paid on that date, to keep in force the policy in suit, terminated the insurance contract, and the defendant society is not liable to pay anything under that contract on account of the death of Robert A. McConnell occurring after that date.

XII.

And the defendant especially requests the court to rule and decide, as a matter of law, that upon the pleadings proof and agreed

statement of facts, the plaintiff cannot maintain this action; and that the defendant is entitled to judgment in its favor, and for its costs.

The defendant requests the court to rule as follows upon the competency of these facts recited in the agreed statement, to wit:

(*a.*) The fact that Mary F. McConnell never saw the receipt for the $20.65 paid upon the delivery of this policy (as recited in the latter part of paragraph "II" of the agreed statement) is one not competent to affect, be proved or considered in this case.

(*b.*) The fact that "no notice of any premium being due was ever given to the complainant, Mary F. McConnell" as recited in paragraph "V" of the agreed statement, is immaterial and irrelevant, and not one competent to be proved or considered in this case.

(*c.*) The fact that no demand was ever made upon her for the payment of any premium on said policy (as recited at the end of said paragraph "V" of the agreed statement) is immaterial, irrelevant and one not competent to be proved or considered in this case.

(*d.*) The forwarding of proofs (as recited in paragraph
42 "VI" of the agreed statement) is immaterial, irrelevant and not competent to be proved or considered in this case.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK,
By GEORGE H. PEPPER, *Sol.*

Opinion of the Court.

Filed Sept. 13th, 1894. J. T. Carter, deputy clerk.

MARY F. McCONNELL
vs.
INSURANCE COMPANY.

I find,

First.

When Robert A. McConnell applied for this policy of insurance, he had the right to elect whether he would ask to become insured under it for a year upon the payment of the premium of $76.25 in advance, or by so paying quarterly installments of $20.65 each, upon the terms and conditions prescribed in the policy.

Second.

Upon making his application thereof, and when he was offered and accepted the policy in suit, Robert McConnell elected and agreed to become insured thereby upon quarterly advance payments of $20.65 each of premium upon the days therein designated for the payment of such installments and subject to the terms and conditions of the policy.

Third.

The dates designated for the payment of the quarterly installments of $20.65 each, and the payment of each installment upon its

designated date, if Mr. McConnell should then be living, were of the essence of this contract of insurance in relation to the matter of its continuance in force.

Fourth.

As a matter of fact the first installment of $20.65 paid upon the delivery of the policy to the applicant is the only sum ever paid under, or in consideration of said policy.

43 Fifth.

In fact, the second $20.65 installment, accruing July 27th, 1893, never was paid to defendant.

Sixth.

No law required any notice to be given by the defendant of the date when any premium or installment would become due, and must be paid, if the insured desired to continue the policy in force, nor of the place and manner of payment.

Seventh.

The defendant did mail to the last known post-office address of Robert A. McConnell the notice of the sum of $20.65 falling due and payable July 27th, 1893, if the policy was to be kept in force, provided for by the statutes of New York.

Eighth.

The failure to pay the installment, $20.65, payable July 27th, 1893, and necessary to be paid on that date to keep the policy in suit in force, terminated the insurance contract, and the defendant is not liable to pay anything under that contract on account of the death of Robert A. McConnell, occurring after that date.

Ninth.

As matter of law, it is ruled and decided that upon the pleadings, proof and agreed statement of facts, the plaintiff cannot maintain this action, and the defendant is entitled to judgment in its favor and for costs.

D. M. KEY, *Judge.*

Prayer for an Appeal.

Filed September 13th, 1894. H. H. Taylor, cl'k.

MARY F. MCCONNELL
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

To the honorable the judges of the United States circuit court for the northern division of the eastern district of the State of Tennessee, at Knoxville:

44 And now comes the complainant, Mary F. McConnell, by her solicitors, and complains that in the record and proceed-

ings and the rendition of the final judgment against this complaint in this cause, on July 28th, 1894, wherein and whereby complainant's suit was dismissed, and she was taxed with the costs thereof, manifest error hath intervened to the great hurt and damage of said complainant, wherefore she prays for an appeal, and such other process as may cause the same to be corrected by the United States circuit court of appeals for the sixth circuit, and she herewith files her assignment of errors.

TULLY R. CORNIC,
R. H. SANSOM,
Solicitors for Compl't.

Assignment of Errors.

Filed Sept. 13th, 1894. H. H. Taylor, clerk.

MARY F. MCCONNELL
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

The complainant, Mary F. McConnell, comes and assigns error to the special findings of fact by the court, to the decree of the court pronounced in this cause on July 28th, 1894, overruling the motion of complainant to set aside and vacate the special findings of fact made by the court, and final decree and judgment pronounced in this cause on July 28th, 1894, and as grounds of error assigns the following:

I.

The court erred in making or rendering any special findings of fact, because the facts being agreed upon by stipulation filed in the cause, the only question submitted to the court for its determination, were questions of law and not of fact.

II.

The special finding- of fact by the court, are not sustained by the agreed statement of facts filed in the cause.

III.

The court erred in finding and holding that the payment of each installment of premium upon its designated date of maturity,
45 was of the essence of the contract in relation to the continuance of the policy in force, because by the express terms of the contract of insurance any unpaid installments of premium for the first year became a mere indebtedness on the part of the insured to the insurer, and any default in their payment on the designated date of their maturity did not affect the validity of the contract of insurance during that period, the first year, to wit, from April 27th, 1893, to April 27th, 1894.

IV.

The court erred in finding and holding that the failure to pay the installment of $20.65, maturing July 27th, 1893, terminated the contract of insurance and released the company from liability thereunder on account of the death of the insured occurring after that date, because under the terms of the contract the premium was paid for the first year to the extent that such payment was necessary to keep the contract in force for that period, to wit, from April 27th, 1893, to April 27th, 1894, and the failure to pay the installment did not affect the validity of the contract for that period, but only had the effect to render such unpaid installment an indebtedness on the part of the insured to the insurer, subject to be deducted from the policy on settlement, and the court's holding otherwise should be reversed.

V.

The court erred in holding that, upon the pleadings and agreed statement of facts, the complainant cannot maintain this action, and that the defendant was entitled to judgment in its favor and for costs, because the policy sued on, the contract of insurance between the parties, having been delivered unconditionally and without fraud, acknowledged upon its face the payment of the premium thereon for the first year, and the defendant is estopped to deny the payment as a ground of forfeiture, for the purpose of avoiding liability for death occurring during that period, and the death having occurred during that period, the complainant under the contract is entitled to recover the face of the policy, less any unpaid installments of premium thereon for the first year with interest, and the court's holding otherwise was erroneous and should be reversed.

VI.

The court erred in holding that upon the pleadings, and agreed statement of facts, the complainant cannot maintain this action and the defendant was entitled to judgment in its favor and for costs, because the policy sued on contains the clause stipulating that "this policy does not go into effect until the first premium has
46 been actually paid during the lifetime and good health of the insured." The delivery of the policy without exacting the payment of the premium in advance, was a waiver of this condition of prepayment, and, having waived this condition precedent, the policy became and was in force and binding under its terms for the first year, and the defendant is estopped to deny its liability thereunder for death occurring during that period. The court's holding to the contrary was erroneous and should be reversed.

VII.

The court erred in dismissing complainant's bill with costs, because under pleadings, exhibits and agreed statement of facts, she is entitled to the relief sought.

VIII.

Wherefore and for the grounds and reasons assigned, the plaintiff, Mary F. McConnell, respectfully submits that the findings of fact, judgment and decrees, respectively, as aforesaid, are erroneous, and she prays judgment accordingly.

TULLY R. CORNICK,
R. H. SANSOM,
Solicitors for Complainant.

U. S. Circuit Court of Appeals for the Sixth Circuit.

MARY F. MCCONNELL
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

Compl't moves the court for leave to amend her assignment of error by adding thereto the following, viz:

IX (9).

The court erred in not holding and deciding that said Robert McConnell was fatally injured and became dead in law on July 27, 1893, and while his said policy was in force, according to Exhibits "A" and "B" to the resp't's answer.

Appeal Bond.

Filed September 13th, 1894. H. H. Taylor, clerk.

47 Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

MARY F. MCCONNELL.
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY. } No. 1012.

Know all men by these presents: That we, Mary F. McConnell, as principal and R. H. Sansom, Tully R. Cornick and George W. Henderson as sureties are held and firmly bound unto Provident Savings Life Assurance Society in the penal sum of five hundred dollars, to be paid to the said Provident Savings Life Assurance Society, its successors and assigns; for which payment well and truly to be made, we bind ourselves, and each of us, and each and every of our several heirs, executors and administrators jointly and severally, firmly by these presents.

Witness our hands and seals on this — day of Sept., '94.

Whereas, the above-named Mary F. McConnell has prosecuted an appeal to the United States circuit court of appeals for the 6th circuit, to be holden at the city of Cincinnati, Ohio, to reverse the decree rendered in the above-entitled suit in said court, by the judge of the circuit court of the United States for the eastern district of Tennessee, northern division.

Now, therefore, the condition of this obligation is such that if the above-named Mary F. McConnell shall prosecute said appeal to effect, and answer all damages and costs, if she fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

MARY F. McCONNELL, [SEAL.]
By R. H. SANSOM, *Att'y.* [SEAL.]
R. H. SANSOM. [SEAL.]
TULLY R. CORNICK. [SEAL.]
GEORGE W. HENDERSON. [SEAL.]

Approved:
D. M. KEY, *Judge.*

Order Granting Appeal.

Entered Sept. 13th, 1894, in Book "U," page 624.

THURSDAY MORNING, *Sept. 13th*, '94.

Court met pursuant to adjournment.
Present and presiding, the Honorable D. M. Key, judge, etc.

48 MARY F. McCONNELL
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

It appearing to the court that complainant has filed assignments of error, a petition for appeal, and also tendered bond in the penalty prescribed by law, with good and sufficient sureties approved by the court, it is ordered, that the prayer of the said petition for appeal be granted to the next term of the United States circuit court of appeals for the sixth circuit, and that citation issue accordingly.
Enter this.

KEY, *J.*

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit*, } *ss:*

To the Provident Savings Life Assurance Society of New York, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the 12th day of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Tennessee, at Knoxville, wherein Mary F. McConnell — plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 13th day of September, in the year of our Lord, one thousand, eight hundred and ninety-four, and of the Independence of the United States of America the one hundred and 119th.

D. M. KEY, *Judge, &c.*

I hereby acknowledge due and legal service of the within citation.

GEO. H. PEPPER,
Sol. for Prov. Savings Life Ass'n Society of N. Y.

49 (Endorsed:) No. 1012. In the U. S. circuit court at Knoxville. Mary F. McConnell against Provident Savings Life Assurance Society. Citation. U. S. circuit court of appeals. Filed Sept. 13, 1894. H. H. Taylor, clerk.

UNITED STATES OF AMERICA, *Eastern District of Tennessee,* } *ss:*

I, H. H. Taylor, clerk of the circuit court of the United States for the eastern district of Tennessee, do hereby certify that the foregoing 78 pages contain a full, true and correct transcript of the record and proceedings had in the cause of Mary F. McConnell *vs.* Provident Saving- Life Assurance Society of New York, as the same appear of record and on file in my office, together with the original citation in said cause.

Witness my hand and the seal of said court at office in Knoxville, Tennessee, this 5th day of October, A. D. 1894.

[SEAL.] H. H. TAYLOR, *Clerk,*
By J. T. CARTER,
Deputy Clerk.

50 And afterwards, to wit, on October 23rd, A. D. 1894, a motion to amend assignment of errors was filed in this court; which reads and is in the words and figures following, to wit:

United States Circuit Court of Appeals for the Sixth Circuit.

MARY F. MCCONNELL
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

Complainant moves the court for leave to amend her assignment of errors by adding thereto the following, viz:

The court erred in not holding and deciding that said Robert McConnell was fatally injured and became dead in law on July 27, 1893, and while his said policy was in force according to Exhibits A and B to the respondent's answer.

And afterwards, to wit, on the same day, an order was made on the foregoing motion; which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

MARY F. McCONNELL
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

On motion of appellant's counsel herein, leave is granted
51 to amend her assignments of error by adding thereto the following:

The court erred in not holding and deciding that said Robert McConnell was fatally injured and became dead in law on July 27, 1893, and while his said policy was in force according to Exhibits "A" and "B" to the respondent's answer.

And afterwards, to wit, on January 23, 1895, a stipulation was filed; which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

MARY F. McCONNELL
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.
Stipulation to Pass this Cause.

Appeal from the United States circuit court for the northern division of the eastern district of Tennessee.

Owing to the illness and engagements of counsel for the parties to this cause it is stipulated and agreed that the same be passed (if the court permit) at the January session, to be heard and argued at its May session, 1895.

TULLY R. CORNICK,
TEMPLETON & CATES,
Attorneys and of Counsel for Appellant.
GEO. H. PEPPER,
EDWIN B. SMITH,
Attorneys and of Counsel for Appellee.

52 And afterwards, to wit, on April 4, 1895, a motion was filed by defendant in this cause to dismiss it for want of jurisdiction; which motion reads and is in the words and figures following:

United States Circuit Court of Appeals for the Sixth Circuit.

MARY F. McCONNELL
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.
Motion to Dismiss for Want of Jurisdiction.

The Provident Savings Life Assurance Society of New York now comes and moves to dismiss this cause out of this court for want of

jurisdiction in the court to hear and consider the same, it being an action at law wherein the United States circuit court for the northern division of the eastern district of Tennessee, on the twenty-eighth day of July, A. D. 1894, rendered and entered its judgment of dismissal of the case and for this defendant's costs, and awarded execution for said costs, and no writ of error has been taken, sued out, or filed to or upon said final judgment, as by the record herein filed appears.

Wherefore the defendant prays that this cause may be dismissed.

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY *IF* NEW YORK,
By EDWIN B. SMITH, *Its Attorney and of Counsel.*

53 And afterwards, to wit, on May 9, 1895, the following order was made in said case, which reads and is in the words and figures following, to wit:

United States Circuit Court of Appeals for the Sixth Circuit.

MARY F. McCONNELL
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

This cause came on this day to be heard and was argued by Mr. Jerome Templeton, for the appellant, and Mr. Edwin B. Smith and Mr. Geo. H. Pepper, for the appellee, and was submitted to the court.

And afterwards, to wit, on July 2, 1895, an opinion was rendered in said cause, which reads and is in the words and figures following:

Opinion.

54 United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1894.

MARY F. McCONNELL, Appellant,
vs.
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK, Appellee.

No. 258. Appeal from the United States Circuit Court for the Eastern District of Tennessee.

Submitted May 9, 1895.
Decided July 2, 1895.

Before Taft and Lurton, circuit judges, and Severens, district judge.

This is an appeal from a decree of the circuit court of the United States for the eastern district of Tennessee. The cause was begun by an original bill filed in the chancery court at Knoxville, in Tennessee, by Mary F. McConnell, a citizen of Tennessee, against The Provident Savings Life Assurance Society, a corporation and citizen of the State of New York.

The bill alleged that the complainant was the widow of one R. A. McConnell, deceased, who died July 28th, 1893; that on the 27th of April, 1893, the said R. A. McConnell procured the defendant to issue to the complainant, his wife, a policy of $5,000 upon his life, which policy was filed and made a part of the bill. The bill further averred that proper proofs of death were forwarded to the defendant; that by the terms of the policy the defendant within sixty days after the presentation of the satisfactory proofs became liable to pay the face of the policy, but failed and refused to do so; that there
55 was actually paid at the time of the issuance and deliverance of the policy the sum of $20.65 on account of the premium thereon for the current year ending April 27th, 1894; that the defendant was justly indebted to complainant in the full amount of the policy less that portion of the premium due thereon for the current year ending April 27th, 1894, which was the premium due for the whole year less the $20.65 paid. The prayer of the bill was for process by subpœna according to the practice of the court, for judgment and decree in favor of complainants for the amount of the policy with interest thereon less the portion of the premium for the current year; and if mistaken in her special prayer, she prayed for all such other, further, different and general relief as the facts might warrant and as the ends of justice might require.

Upon this bill subpœna was issued, summoning the defendant to appear before the chancery court at Knoxville to answer the original bill which the complainant had filed against it. The subpœna was served upon the agent of the defendant. Thereupon the cause was removed by defendant to the court below, and on the 9th day of July thereafter the following motion was made in that court. "Came the Provident Savings Life Assurance Society of New York, by its solicitor, George H. Pepper, and moved the court to allow the transcript in the above-entitled cause from the chancery court of Knox county removed to this court, on bond and petition to be filed in this court. And it appearing to the court that the law in regard to removals has in all things been complied with, the court is pleased to sustain said motion and order that the same be filed and docketed."

Thereupon the defendant filed its answer.

The answer begins as follows:

"The answer of the Provident Savings Life Assurance Society of New York to the bill filed against it in the chancery court of Knox county, Tennessee, and removed to this honorable court.

To the honorable judges holding United States circuit court at Knoxville, Tennessee:

Respondent answering complainant's bill, admits that complainant is the widow of Robert A. McConnell, deceased."

The answer then proceeds to admit certain facts in the bill, then sets out the issuance of the policy, its character, the proper construction thereof, the failure of McConnell to pay the amount due quarterly on the premium, the forfeiture of the policy accruing therefrom and denies certain constructions put upon the policy by the

complainant. The answer concludes, "All allegations in complainant's bill not admitted or denied are hereby expressly denied. Respondent denies that it owes complainant anything on account of said lapsed policy, and prays to be hence dismissed with its reasonable costs." The answer is signed, The Provident Savings Life Assurance Society of New York, by Sheppard Homans, president; George H. Pepper, solicitor; Edwin B. Smith, of counsel.

56 On July 21st, 1894, the parties to the action signed an agreement as to facts, which was filed upon the same day. The caption of the agreement is as follows:

"In the United States Circuit Court for the Northern Division of the Eastern District of the State of Tennessee.

For the purpose of saving time and expense, and expediting the trial of this cause, the following facts are agreed upon between the parties, and as such may be taken and considered by the court in the determination of this lawsuit, so far as the facts themselves are competent, as fully as though established by competent testimony in regular form taken and submitted."

At the end of the agreement is this: "Formal replication to defendant's answer is waived."

On the same day was filed a stipulation as follows:

"It is hereby stipulated by and between the parties hereto, and their attorneys that this cause be tried by the court without a jury, a jury trial being hereby waived under sections 649 and 700 of the Revised Statutes of the United States."

On July 28th, 1894, a bill of exceptions was signed by the judge and filed.

Special findings of fact were made by the court. Motions were made to set them aside, the motion was overruled and the following entry was made in the court below:

"Be it remembered that this cause came on for final hearing before the Honorable D. M. Key, judge of the United States district court, holding the United States circuit court at Knoxville, Tennessee, on this the 28th day of July, 1894, upon the pleadings and agreed state of facts, with the exhibits to said agreed state of facts, including application for insurance and the policy issued thereon and exhibits with bill and answer, and the same having been considered by the court, and the court being of the opinion that the complainant is not entitled to relief, the court is pleased to order that the complainant's bill be dismissed and the defendant have and recover of and from complainant and C. L. McConnell, surety upon the prosecution bond, the costs of this cause, for which execution is awarded."

A prayer for the appeal was then filed by complainant and it was allowed.

TAFT, circuit judge, after stating the case, delivered the opinion of the court:

A motion is made by the appellee to dismiss this appeal on the ground that the proceeding below was a proceeding at law which can only be reviewed by a writ of error in this court. An examination of the record satisfies us that the cause was heard upon the equity side of the court. The action was begun by bill in the State chancery court and removed to the circuit court of the United States. The forms of pleading maintained were those of the chancery jurisdiction. It is true that there is a stipulation waiving a jury and to that extent the proceedings were inconsistent
57 with equity procedure. But the bill throughout was treated as a bill in chancery, the answer was in the form of an answer in chancery, the formal replication required in chancery was expressly waived and the action of the court was expressed in a decree by which complainant's bill was dismissed. There is nothing to show positively and conclusively that the cause was docketed on the equity side of the court but we think this is the necessary inference from the form of the pleadings and the entries. This being so the only mode by which the action of the court below could be reviewed was by an appeal. The cause of action of the appellant and complainant below was at law. It was a simple suit to recover the amount of the policy upon the happening of the condition upon which by the terms of the policy it was due. It had not a single equitable feature in it and there was no relief needed or prayed for, which necessitated a resort to the court of equity. The jurisdiction of the Tennessee chancery court rested only upon a Tennessee statute enlarging the jurisdiction of courts of equity, and not applicable to courts of the United States. In such a case we think that a United States court of equity has no jurisdiction whatever and that it is the duty of this court to reverse the decree of the court below and remand the case with instructions to redocket the cause as one at law and to require the parties to reframe their pleadings to conform to procedure at law.

In Reynolds *vs.* Watkins, 9 C. C. A., 273, we had occasion to consider the proper course for this court to pursue in regard to appealed causes which had been heard in equity below when they should have been heard at law. In that case Judge Lurton, delivering the opinion of the court, said: "No question of jurisdiction was raised in the circuit court, but it is now, for the first time, insisted that complainants had a plain and adequate remedy at law, and that, therefore, a court of equity will not entertain this suit. An objection that the remedy at law was plain and adequate should be taken at the earliest opportunity. Yet neither consent nor negligence will confer jurisdiction in equity where none really exists, and the court may at any stage of a cause entertain such objection, or dismiss a bill *mero motu*. Yet there are cases, where if the objection of want of jurisdiction because of an adequate remedy at law be not taken in the circuit court, and be for the first time presented upon appeal, this court will not feel itself obliged to entertain an objection com-

ing so late, especially if the subject-matter of the suit is of a class over which a court of chancery has jurisdiction, and it is competent for the court to grant the relief sought. Reynes *vs.* Dumont, 130 U. S., 355; 9 Sup. Ct., 486; Kilbourn *vs.* Sunderland, 130 U. S., 505; 9 Sup. Ct., 594. Looking to the whole of the original bill, including the transcripts of two suits in equity involving and affecting the title and interest of complainants and filed as exhibits to the bill, we are of opinion that the interest of the complainants was so essentially of an equitable character as to constitute a controversy
58 over which a court of equity may well assume jurisdiction."

In Reynes *vs.* Dumont, 130 U. S., 355, 395, the Chief Justice, speaking for the Supreme Court, said:

"It was held in Lewis *vs.* Cocks, Wall., 466, that if the court upon looking at the proofs found none at all of the matters which would make a proper case for equity, it would be the duty of the court to recognize the fact and give it effect, though not raised by the pleadings nor suggested by counsel. To the same effect is Oelrichs *vs.* Spain, 15 Wall., 211. The doctrine of these and similar cases is, that the court, for its own protection, may prevent matters purely cognizable at law from being drawn into chancery at the pleasure of the parties interested, but it by no means follows, where the subject-matter belongs to the class over which a court of equity has jurisdiction, and the objection that the complainant has an adequate remedy at law is not made until the hearing in the appellate tribunal that the latter can exercise no discretion in the disposition of such objection."

We think that the case at bar is not of a class of suits usually cognizable in a court of equity, that there is nothing at all in it which makes it a proper case for chancery jurisdiction, and that the principle laid down in Lewis *vs.* Cocks, 23 Wall., 466, is applicable.

Both parties seemed to have elected to treat the cause as one in equity and not to have objected to proceeding on the equity side of the court. Owing to this action, the defeated party sought review in this court by appeal as from a decree in equity, and it is now for the first time objected by the successful party below after the time has elapsed within which a writ of error can be brought, that the cause was not an equity cause and that the proper mode of review was by writ of error.

Under such circumstances we think the decree of the court below should be reversed for want of jurisdiction with instructions to remand the cause to the law docket and to reframe the pleadings accordingly. The costs of the case in this court and in the court below will be divided.

59 And upon the same day—that is to say, July 2, 1895—the following decree was entered; which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

MARY F. McCONNELL
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Tennessee, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed that the decree of the said circuit court in this cause be, and the same is hereby, reversed, and the cause is remanded to the court whence it came, with instructions to docket the cause on the law side of the court, with leave to reframe the pleadings; costs to be divided.

60 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record in the case of Mary McConnell *vs.* The Provident Savings Life Assurance Society of N. Y., No. 258, October term, 1894, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the sixth circuit, at the city of Cincinnati, Ohio, this 23d day of October, 1895.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

[Endorsed:] United States circuit court of appeals for the sixth circuit. Mary F. McConnell *vs.* Provident Savings Life Assurance Society of N. Y. Certificate for copy of transcript.

C. G. Bergeyne's Printing Business, 128-130 Chambers St.

NOV 18 1895

JAMES H. McKENNEY, CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1895. No. 799

MARY F. McCONNELL,
Complainant and Appellant,

AGAINST

THE "PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK".

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petition of the Provident Savings Life Assurance Society of New York respectfully shows:—

That, on the twenty-sixth day of February, 1894, Mary F. McConnell of Knoxville, Tennessee, filed in the Chancery Court of that State, sitting at said Knoxville, her complaint against your petitioner, the Provident Savings Life Assurance Society of New York, claiming to recover Five thousand dollars upon an insurance policy issued by said defendant upon the life of her husband, late R. A. McConnell, who died July

28, 1893. Subpœna to answer her said complaint issued and was served February 27, 1894. The defendant appeared and (upon the ground of diverse citizenship of the parties) removed the case to the United States Circuit Court for the Northern Division of the Eastern District of Tennessee, and subsequently filed its answer to the complaint, no repleading being thought necessary by either party. The Chancery Court has jurisdiction of actions at law as well as of suits in equity. The complaint simply declared upon the policy and a death within its terms and prayed judgment for its amount and interest. The answer denied that Robert A. McConnell's death was within the policy, indicating certain of its provisions as sustaining this contention, concluding with a denial that it owed the plaintiff anything on account of said lapsed policy, and prayed to be dismissed with costs.

An agreement as to facts was filed July 21, 1894, and a written waiver of a jury and submission of the cause to the Court. It was heard, upon the pleadings, agreed state of facts and exhibits, July 27, 1894, by the judge holding the term who found certain facts, the last finding stating this conclusion, viz.;

"As matter of law, it is ruled and decided that upon the pleadings, proof and agreed statement of facts, the plaintiff cannot maintain this action, and the defendant is entitled to judgment in its favor with costs."

Such judgment was accordingly then entered.

The plaintiff assigned error, prayed and was allowed an appeal to the next term of the United States Circuit Court of Appeals for the Sixth Circuit, and citation issued accordingly and was duly served. *No writ of error was ever sued out.* When the cause was reached in said United States Circuit Court of Appeals, the defendant filed and presented a motion to dismiss the cause out of that Court, for want of jurisdiction, because no writ of error had been taken to the judgment; and also filed briefs fully discussing the merits, in case

that Court held it had jurisdiction. The cause was argued upon the motion and the merits at the same time.

The said United States Circuit Court of Appeals, without considering the merits, reversed the judgment, wholly upon the ground that the suit in the State Court was one in equity, and that there should have been a repleading, in the form of an action at law, in the federal court, which it directed, awarding a new trial after such pleadings should be filed.

The Provident Savings Life Assurance Society of New York, the defendant, contended and contends that the complaint was a perfectly good declaration at law, under the Tennessee Code, and in the federal courts sitting in that State (or under any other system of pleading) to recover $5000 under an insurance policy ; and that the defendant's answer stated, in the form of actions at law in said State, and in the federal courts held therein, a good legal (and not merely an equitable) defence to said demand ; that no repleader was necessary or proper ; and that the said United States Circuit Court of Appeals had no jurisdiction to reverse the judgment of said United States Circuit Court, and award a new trial, after repleading.

And the defendant further contends, that if it had jurisdiction, said United States Circuit Court of Appeals, upon the facts found by the said Circuit Court in this case, should have affirmed the judgment below.

And your petitioners, being without further remedy in the premises, now respectfully present this their petition, accompanied by a certified copy of the record in said cause, and pray that a writ of *certiorari* issue out of this Court, directed to the said United States Circuit Court of Appeals for the Sixth Circuit, requiring said Circuit Court of Appeals to certify said case to this Court for its review and determination, or that this Court will " otherwise, in such manner and form as it may direct and determine, review the proceedings

and judgment in this case and take such action therein as to it justice may seem to require."

And your petitioner will ever pray, etc.

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK,
by CHARLES E. WILLARD
President.

EDWIN B. SMITH,
120 Broadway, New York,
Of Counsel for petitioner.

STATE OF NEW YORK,
City and County of New York } ss:

CHARLES E. WILLARD of said New York, being duly sworn, deposes and says that he is the President of the above-mentioned Provident Savings Life Assurance Society of New York, petitioner, and defendant in the above-entitled cause; that he has read the foregoing petition and knows the contents of it and that the same is true.

CHARLES E. WILLARD.

Subscribed and sworn to before me this 17 day of October A. D. 1895

BENJAMIN BARKER, JR.
Notary Public,
N. Y. County.

To MARY F. MCCONNELL, plaintiff, and to her counsel and attorneys of record in the cause above-entitled:—

You will please take notice that the foregoing petition, with copy of the record, and a brief in support of said petition, will be presented to the Supreme Court of the United States on Monday the 18th day of November, A. D. 1895, or so soon thereafter as counsel can be heard; and a motion will then be made that the prayer of said petition be granted.

Very respectfully,

EDWIN B. SMITH,

Attorney and Of counsel for the Provident Savings Life Assurance Society of New York, petitioner.

Received copy of the foregoing petition and notice thereon this 28th day of October, A. D. 1895.

R. H. Dawson,
Sally P. Brock
Templeton Cabell,

Attorney and of counsel for said Mary F. McConnell.

NOV 18 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 799

MARY E. McCONNELL,
Appellant,
against
THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK,
Appellee.

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Brief on Appellee's Petition for Certiorari.

EDWIN B. SMITH,
Counsel for Petitioners.

C. G. Burgoyne, Cor. Walker and Centre Sts., N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No.

MARY F. McCONNELL,
Appellant,

vs.

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW-YORK,
Appellee.

APPELLEE'S PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION.

Statement.

The main question presented upon this petition is whether the Circuit Court of Appeals ever acquired any jurisdiction whatever over this cause; whether it had the *power* to remand it; and, incidentally whether, even if it possessed the power, it should have so exercised it upon the plain facts of this case.

The facts are sufficiently set forth in the petition; fully, in a very few pages of the record. (Rec. 37, 38.)

In short, this was and is a suit to recover $5000 upon an insurance policy on the life of plaintiff's husband;

defended, successfully, upon the ground that the plaintiff's husband was not, at the time of his death, insured by said policy, which had before then expired.

It was brought in a court of law and equity in Tennessee; having the same power over causes of either character, though its *name* was "The Chancery Court." No different form for initiating suits at law and those in equity existed, or was recognized, therein.

Yet, passing over the merits (which were fully argued) the Circuit Court of Appeals reversed the judgment and remanded the cause for a re-pleading.

We contend this technicality was unfounded; that this was an action at law, pure and simple; and that the Circuit Court of Appeals had no authority to remand the cause, because there was no writ of error ever sued out.

The Court did gross injustice by the exercise of this power, if possessed by it.

Summary of following argument.

FIRST. This Court has a revisory power it ought to exercise in the present instance.

SECOND. This is an action at law; initiated as such in statutory form, in a court having cognizance of civil cases.

THIRD. Being so instituted, no repleading was necessary.

FOURTH. It was tried and determined at Circuit *as an action at law.*

FIFTH. No writ of error having been sued out, the Circuit Court of Appeals *had no jurisdiction* to exercise any authority over it; either by awarding a new trial or otherwise.

SIXTH. Gross injustice is done upon a mere technicality, even if that technical ground exists—which we deny.

An action at law, avowedly tried under R. S. secs. 649, 700, is sent back (without any consideration of the merits) upon the mere verbiage, and not "the essential character," of the pleadings.

POINTS.

I.

Revisory power under act of 1891.

"In any such case as is herebefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require, by *certiorari or otherwise*, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." (26 Stats. 827)

The power conferred by this statute is not *simply* revisory; but revisory that it may exercise a *supervisory* authority over inferior Federal tribunals; analogous to that which the Circuit Courts had over bankruptcy proceedings in the District Courts; with *more* than the guardianship exercised by the Kings Bench over lower courts.

The words "*or otherwise*" were inserted, *ex magna cautela*, to emphasize this relation, and indicate that a motion for the intervention of this court would suffice to set this machinery into operation; also, that even where a writ of *certiorari* (or application therefor) is employed, no narrow technicality limits the *authority*

of this court; though, of course, its wise discretion will circumscribe the exertion of it to questions of importance.

Formerly, the writ of *certiorari* was not *specified* in any statute giving authority to this court, but was issuable when 'necessary for the exercise of *their* respective jurisdictions' (R. S. sec. 716) by superior courts—not to ascertain whether or not *some other court* had properly exercised its jurisdiction.

So long as (and *because*) this condition of legislation existed, it *was* true that there *was*

"No analogy between the power given by the Constitution and the law of the United States to the Supreme Court and the other inferior courts of the United States and to the judges of them to issue such processes and the prerogative power by which it is done in England. (*Ex. p.* Vallandigham, 1 Wallace, 249.)"

But the whole scope and force of this act of 1891, as the words 'or otherwise' render still more apparent, is to provide for and sanction that prerogative *supervisory* use of the writ well known to English law and to the administration of justice in many of the states.

In England and in some States, the writ issues to remove an indictment or civil cause from an inferior to a superior court *for trial;* and in many States it is "but a substitute for an appeal". (Hurd vs. Tombes, 7 Howard, (Miss.) 234; Com. v. Simpson, 2 Grant's Cas., 438; Dougan v. Arnold, 4 Dev., (Law), 101; Burk v. Davidson, 5 Humph. 425; Perkins v. Hadley, 4 Hayward, (Tenn.), 143; Kearney v. Jackson, 1 Yerg., 294.)

Of course, this Court would not be imagined to employ it for the first purpose; but, equally of course, it was intended to subserve the second, wherever this court sees sufficient cause to direct its issue.

With the before-mentioned immaterial exception of causes certioraried for trial, whenever the writ issues it is for one of two purposes, viz.; either to exercise the supervisory power of the court issuing it over that to

which it runs; or else as auxiliary to some other process by which the record of the latter in a given case is brought before the former upon suggestion there made of a diminution or defect therein. (Dunlap's Forms, 4th ed., 239, 240.) It is in the latter instance only that its issue becomes "necessary for the exercise of the jurisdiction" of the issuing court over the cause previously brought within that jurisdiction; and this was its only use here formerly; but now the latter is added, and made its predominant use. Indeed, the carefully added provision, that this Court may proceed to do aught it could have heretofore done upon writ of error or appeal, extends the supervisory authority beyond that exercised by means of this writ, at common law.

At common law the writ issued from a superior to an inferior tribunal for both these purposes, by virtue of the right of the former to supervise and control procedure in the latter and to restrain it within its proper jurisdiction in all its proceedings, as well as for the information and guidance of the superior court in finally disposing of the cause upon its merits. As to the first of these uses, it is said in Birdsall v. Philips, (17 Wend., 468,) "This writ is but an emanation from the general supervisory duty of the Supreme Court to restrain the action of all inferior magistrates within their legal grasp." (1 Monell's Practice, 264, *et seq.*) "The supreme court [of Penn.] thus having no power to review the merits, can only *under its general power to supervise the proceedings of inferior tribunals* bring up the record for this special purpose." (*In re* Sheppard, 77 Penn., 301).

We have instanced the Circuit Court's supervision of bankruptcy proceedings. Of this, in a case arising in his circuit, CHASE, C. J., said: "The better and, indeed, as it seems to me, the only construction which gives due effect to all parts of the act relating to revisory jurisdiction seems to be that which, on the one hand, excludes from the category of general superintendence and jurisdiction of the Circuit Court the ap-

pellate jurisdiction defined by the eighth section, and, on the other, brings within the category all decisions of the District Court or of the District Judge at Chambers, which cannot be reviewed upon appeal or writ of error under the provisions of that section. *The exercise of the general jurisdiction is not placed by the act under specific regulations and restrictions*, like the proceeding by appeal or writ of error." *In re* Alexander (2 Am. L. T. Bank. Rep., 84, and 3 Bank. Reg., 6 ; Hall vs. Allen, 12 Wallace, 454 ; Morgan vs. Thornhill, 11 Wallace, 80 ; Gen. Stats. of Mass., c. 118, §16 ; Palmer vs. Dayton, 4 Cush., 270 ; Thompson vs. Thompson, *Id.*, 127 ; Harlow vs. Tufts, *Id.*, 452 ; Cheshire Iron Co. vs. Gray, 3 Gray, 533 ; Bump on Bankruptcy, 265, 266.)

The supervisory power, like the appellate, is entirely the creature of statute, so far as this Court is concerned.

Judge COOLEY observes that " Where the writ is given by statute, a broader scope may be, and usually is, given to the writ than it has at common law." (Cooley on Tax., 753.)

Washington v. Parker, 60 Ala. 447.
McAllilley v. Horton, 75 *Id.* 491.
Miller v. Trustees, 88 Ills. 26.
Hyslop v. Finch, 99 *Id.* 171.

A couple of cases may be added as indicating the extent to which this supervisory power is practically carried ; and with reference to which practice Congress enacts that it may be here exercised by *certiorari* ' or otherwise.'

Thompson v. Sch. Dist. 25 Mich., 484.
State v. Dodge, 56 Wis. 79.

" And so it is competent for this Court, by *certiorari*, to direct *any* case to be certified " which is not appealable, or reviewable by writ of error.

Lau Ou Bew, 144 U. S. 58 mid.

II.

Jurisdiction of the Circuit Court of Appeals.

Preliminarily to entering upon any examination into the merits of the cause in the Circuit Court of Appeals—but discussed and submitted with the merits—a suggestion (in the shape of a formal motion to dismiss: Rec. 44, fol. 52) was offered as to whether that Court had acquired any jurisdiction to consider the matter at all; upon the ground that, being an action at law, no writ of error had been filed therein;—an appeal, in a law case, being a nullity. *(Ibid.)*

This motion was submitted that, if the Court was really without jurisdiction, it might not assume to announce a decision in a cause it had not competent authority to decide. If this were a suit of law, it had no jurisdiction. If this could be construed to be an equity case, the appeal brought it before the Court to decide it as such. The Court assumed it to be a case in equity (which we deem an untenable position) but exercised no other act of jurisdiction than to remand it to be converted into an action at law.

We still think that Court without jurisdiction to make such order (Rec. 50, fol. 59) because no writ of error was ever sued out to reverse the judgment in favor of the defendant, entered July 28, 1894 (Rec. 34, fol. 39) for costs, and awarding execution therefor. *(Ib.)*

The action is a suit at law, to recover the amount of an insurance policy. *(Id., 2, 3.)* It was originally brought in the Chancery Court at Knoxville *(Id. 1)* a tribunal having common-law, as well as Equity, jurisdiction.

Title 9, Tennessee Code of June 1, 1884, treats "of the Chancery Court;" chapter 1 of this title "of the jurisdiction of the Chancery Court;" article I of this

chapter of its exclusive equity jurisdiction; and article II of its concurrent jurisdiction. This is the third provision of that article, reproducing pre-existent law;—

"5043. It shall have and exercise concurrent jurisdiction with the circuit court of *all civil actions, triable at law*, except for injuries to person, property or character, involving unliquidated damages."

Chapter 2 of this articie treats "of the pleadings in the chancery court."

"5055. Suits are commenced in the court of chancery by bill or petition," etc. § 5056 states the form of commencement, designating the parties as complainant and defendant." The complainant respectfully shows to the Court, etc. "5057. The bill should contain a clean and orderly statement," etc.

This applies to actions at law, pure and simple, as well as to equity causes.

5219. The trial shall be conducted *like other jury trials at law*, the finding of the jury shall have the same force and effect, etc.

This being an action at law, it proceeded in the U. S. Circuit Court in the same form that it had, and would have retained, in the Chancery Court of Tennessee, from which it was removed. U. S. Rev. Sts. § 914.

"The purpose of this provision [§ 914] is apparent upon its face . . . It was to bring about uniformity in the law of procedure in the Federal and State Courts of the same locality. It had its origin in the Code-enactments of many of the States."

Nudd v. Burrows, 91 U. S. 441.
Lamaster v. Keeler, 123 *Id.* 388.

By the law of Tennessee "existing at the time", this Chancery Court had jurisdiction of common-law actions like this; but *such* actions were required to be commenced by bill or petition, if there instituted. (See Sup.)

In New-York, and in many other code States, the plaintiff's first pleading is statutorily and actually in practice denominated a complaint, and the defendant's an answer; alike, whether legal or equitable relief is sought.

If the complainant, or plaintiff's, bill, or complaint, or petition, sets out *facts* constituting an action at law, requiring only a judgment for so much money, it *is* an action at law. If the *facts* set out an equitable cause, and require equitable inteference, it *is* a suit in equity.

The *name* of the pleading by which the litigation is initiated and stated is immaterial; as is the *name* of the Court, if it have both legal and equitable jurisdiction.

"The common-law forms of pleadings are no longer necessary in the United States Courts, nor are they admissible, except as they may be deemed substantially a compliance with the requirements of the Code of Procedure of the State as to pleadings"—[to wit, as to pleadings in the Court from which the cause is removed.]

Lewis v. Gould, 13 Blatc. 216,
citing 21How. 481, and 6 Wall. 514.

The question, as we understand it, is whether or not Mrs. McConnell, by her bill, instituted against us, in the forum of her original selection, an action at law, or a suit in equity; and we do not comprehend how any judicial mind *can* see aught in the bill but the statement of a legal ground of recovery.

It is an action at law, and nothing else—and never was.

"It is thoroughly settled that remedies in the courts of the United States are at common law or in equity *according to the essential character of the case*, uncontrolled in that particular by the practice of the State courts."

N. O. v. La. Co. 129 U. S. 46.
Van Norden v. Morton, 99 *Id.* 380.

Applying to our case the last-mentioned citation (99

U. S. 380, middle) we say: The Statute of Tennessee conferred a new right or remedy, to wit, by suit at law in the Chancery Court; and that "the jurisdiction of such cases, as between the law side and the equity side of the *federal* courts must be determined *by the essential character of the case;* and unless it comes within some of the recognized heads of equitable jurisdiction, it must be held to belong to the other." *(Ibid.)*

This must mean that unless it has "the essential character" of a suit in equity, it must be taken to be an action at law; regardless of the *name* of the court from which it was transferred, or that the pleading bore there; or of its mere verbiage.

It means "not merely *suits* which the common law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where *equitable rights* alone were recognized and equitable remedies administered." (Italicized in original as here.)

Fenn v. Holme, 21 How. 486.

Upon the next page this opinion *(Ib.* 487) says there is no authority for "legal and equitable claims to be blended in one suit." . . . . "a party who claims a legal title must proceed at law; and may undoubtedly proceed at law, and may undoubtedly proceed according to the forms of practice in *such* cases in *the* State Court." *(Ibid.)* This must mean such cases in *the* court from which it is removed.

West v. Smith, 101 U. S. 264.

This *petition* being, in its "essential character" the bringing of a suit at law, no *subsequent* pleading could convert it into a bill in equity.

It was *as a suit at law* that the federal court acquired, and *exercised*, its jurisdiction over it; so there was not the "want of jurisdiction" therein for which its judgment was reversed. (Rec. 49, bottom.)

Heretofore, so far as we can find, there has been no reversal, or requirement of repleading, unless there has been a blending of legal and equitable causes; or the *trial* of a legal action by a court of equity, upon a substituted bill. (See 6 Wall. 134.)

We doubt if there ever was an instance before, where *a cause initiated by a pleading statutorily sanctioned as a means of commencing a civil action in the court in which it was filed*, removed to the federal court, and *there tried as an action at law*, was ever reversed and remanded that it might be *there tried over again at law, upon a mere striking out of the verbiage of the original statutory pleading*, not affecting "the essential character" of the plaintiff's claim.

The opinion of the Circuit Court of Appeals concludes with the statement that the decree of the court below should be reversed *for want of jurisdiction* with instructions to remand the cause to the law docket," etc.; although it states, upon the preceeding page that there is nothing but inference to sustain the assumption that the case was docketed upon the equity side—if this clerical act would make any difference. (Rec. 49 bottom, and 48, fol. 57.)

We have shown the U. S. Circuit Court *did have jurisdiction* of this case, *originally brought as an action at law.* IT WAS TRIED THERE AS AN ACTION AT LAW. There would have been a jury impannelled to try it, had not the parties stipulated to waive one (Rec. 24) under U. S. Rev. Sts., secs. 649, 700, which *only* apply to "civil cases."

Certain facts were agreed upon; others were proved at the trial; and the judge found the ultimate facts under sec. 649. (Rec. 34, fol. 38; 35, 36; 37, 38, fols. 42 and 43.) True, the clerk has improperly indorsed the court's findings as an "opinion"; but they state

their own character, under the waiver shown, and this clerical misprision will be disregarded.

U. S. v. Wilkinson, 12 How. *252.
Herbert v. Butler, 97 U. S. 319.

The only question left open to the court of Appeals, under sec. 700, was whether the facts found supported the judgment, or decree, of dismissal and for our costs.

Boogher v. Ins. Co. 103 U. S. 97.

This question could be brought before that Court only by a writ of error.

III.

No writ of error.

Everybody admits this is in fact a suit at law. We assert it was so treated, tried, and determined in the Circuit Court; and that its determination is final, because no writ of error was ever sued out to review its decision.

Bonduvant v. Watson, 103 U. S. 279.
Ex parte Ralston, 119 *Id.* 614.
Chateaugay Iron Co., 128 *Id.* 555.
Stevens v. Clark, 62 F. R. 321.

IV.

Gross injustice done.

It cannot be denied that the action of the U. S. Circuit Court of Appeals sacrifices the aim and object of all litigation to a bald (if tenable) technicality. It sac-

rifices substance to form; defeats, and not promotes, the administration of justice. It sends back to try over again at law a cause once so tried, without the least reason to doubt it was rightly tried and determined.

The question of jurisdiction was suggested; but, at once, the merits were argued; and could have been ascertained and declared in less time than the Opinion devotes to a technicality, which we believe unfounded.

EDWIN B. SMITH,
120 Broadway,
Of Counsel for petitioners.

JAMES H. McKENNEY,
CLERK

No. 799

Supreme Court of the United States.

OCTOBER TERM, 1895.

Mary F. McConnell, Complainant and Appellant,

vs.

The "Provident Savings Life Assurance Society of New York."

Answer and Brief of Mary F. McConnell to Petition for Certiorari.

JEROME TEMPLETON,
Solicitor for Mary F. McConnell.

R. H. SANSOM,
T. R. CORNICK,
Of Counsel.

GIBBS BROS. & CO., PRINT., KNOXVILLE, TENN.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

MARY F. McCONNELL,

Complainant and Appellant,

AGAINST

THE "PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK."

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Answer of Mary F. McConnell to the Petition of The Provident Savings Life Assurance Society of New York.

Thereupon, said Mary F. McConnell, protesting that said petition is insufficient and erroneous, and renewing her exceptions thereto, nevertheless makes the following answer thereto, viz.:

1st. Said suit was brought in the Equity Court of the State and removed to the United States Circuit Court by Defendant, as alleged.

2nd. In the United States Court it was tried as an equity case; it was neither proceeded in nor tried as a law case. The bill and answer were both pleadings in equity, the answer being filed by said Company as an answer in equity in the United States Court after removal, all of which will appear by an inspection of the Record.

3rd. The appeal was properly taken, as in equity cases; a writ of error would have been improper, but, if this were not so, the Appellee waited until the six months had expired before raising the objection.

4th. In the Court of Appeals the Petitioner Insurance Company itself raised the objection that the case was a law case and not an equity case, by making the motion to dismiss. This proposition was agreed to by Appellant in that Court. In remanding the case the Appellee was simply required to take its own medicine.

5th. After this case was remanded and docketed on the law side, the following entry was made October 8th, 1895, viz: "In this cause, by consent of the parties, it is ordered that the time for filing declaration by the plaintiff be extended to Monday, Oct. 14th, 1895." (See Record from Knoxville.)

Defendant had already obtained an order by which "the defendant will be allowed sixty days thereafter to plead to the same (declaration) or make other defense," when the law allowed but two days. (See Record from Knoxville.)

The defendant has therefore estopped itself from

not submitting to the law jurisdiction of the United States Circuit Court.

6th. The pleading was strictly according to the forms of equity. The cause was originally brought in the State Chancery Court, under Section 5043 of the Code of Tennessee (1884), which is as follows:

"It (the Chancery Court) shall have and exercise concurrent jurisdiction with the Circuit Court of all civil actions triable at law, except for injuries to person, property or character involving unliquidated damages."

This act did not change the rule of pleading, but parties seeking the aid of Courts of Equity in the enlarged jurisdiction conferred by the statute must conform their pleadings and practice to the settled rules of that Court.

Lenoir vs. Mining Co., 88 Tenn. (4 Pick.), 174.

By the Statutes of Tennessee the old common law forms of pleading in cases at law are maintained. Section 3606 of the Code of Tennessee is as follows:

"The declaration shall state the plaintiff's cause of action. It may contain several statements or counts. But where several distinct causes of action against the same party are joined, the Court may direct separate trials of the issues."

Sections 3616, 3617, 3623 to 3626 inclusive, are as follows:

"A plea shall in all cases contain a sufficient statement of the facts relied on as a defense to the action, except in the cases provided for in Sections 3623–3625."

3617. "The defendant may plead as many pleas as he has real grounds of defense."

3623. "The defendant may enter a general denial of the plaintiff's cause of action, equivalent to the general issue heretofore in use."

3624. "He may plead such general plea, whether such plea would have been good heretofore or not."

3625. "But whenever such general plea is filed, the defendant shall, unless notice is waived, give notice of all his real defenses, whether by way of denial or avoidance, though such defense might have been admissible heretofore under the general issue. And no matter of defense of which the notice is not given shall be given in evidence or relied on. Such notice shall state such defenses separately, and if the same are not stated clearly, or are double or insufficient, they may be struck out on motion."

Under these statutes it is held that each plea must present a distinct, separate defense. A plea presenting two or more defenses is bad for duplicity.

Langford vs. Frey, 27 Tenn. (*8 Humph.*), *445.*
Dockey vs. Miller, 28 Tenn. (*9 Humph.*), *731–5.*
R. R. vs. Conk, 67 Tenn. (*11 Heis.*), *577.*

It results that the Bill and Answer in this cause were pleadings in equity only, and were not a good declaration and plea under the Statutes of Tennessee, as insisted by the other side. *Ergo* under the Federal Statutes and decisions, the U. S. Court, sitting in equity had no jurisdiction of this case—it was necessary to docket the case on the law side and reframe the pleadings.

McConnell vs. Provident Sav. Life Assu. Soc. of N. Y.
69 Fed. Rep. 113 (*Pamphlet*) *July 2, 1895.*

We append to this brief a printed copy of the pro-

ceedings in this case, in the U. S. Circuit Court at Knoxville, since it was remanded, having filed a certified transcript of same with the Clerk of this Court.

We insist that the application of the Insurance Co. to bring this case to this Court for review, should be denied, and that trial in the lower Court at Knoxville should be allowed to proceed.

And now having fully answered, Respondents pray to be dismissed, etc.

JEROME TEMPLETON,
Solicitor for Mary F. McConnell.

R. H. SANSOM,
T. R. CORNICK,
Of Counsel.

BRIEF.

In resistence of the petition and motion for writs of certiorari, it is further submitted:

I.

Under Section Six (6), of the Judiciary Act of March 3rd, 1891, "the judgments and decrees of the Circuit Court of Appeals shall be final in all causes in which jurisdiction is dependent entirely upon the opposite parties to the suit of controversy, being aliens and citizens of the United States, or citizens of different States."

The question of jurisdiction in this case is entirely dependent upon the diverse citizenship of the parties, so that under the Act the judgment of the Circuit

Court of Appeals is final, and no *appeal* will lie therefrom.

It is conceded, however, that under a different clause of the same Section of the Act, it is competent for the Supreme Court to require, by certiorari or otherwise, the case to be certified to the Supreme Court by the Circuit Court of Appeals; the clause referred to being as follows:

"That in any such case, as is hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination."

It was so held in the case of Lau Ow Bew *vs.* U. S., 144 U. S., 47—but it is only when questions of gravity and importance are involved that the power of the Supreme Court can be properly invoked to require a case to be certified; in which the judgments and decrees of the Court of Appeals are made final.

Lau Ow Bew's cases, 141 U. S.. 587 and 144 U. S., 47.
American Construction Company vs. Jacksonville R. R. Company, 148 U. S., 372.
In re Woods, 143 U. S., 202.

Were it otherwise, the very object and purpose of the Act establishing the Court of Appeals would be defeated.

It is well known as a matter of public history that the primary object of this Act, as judiciously declared in the leading cases under it, was to relieve this Court of the overburden of cases and controversies arising from the rapid growth of the country and the steady increase of litigation, and for the accomplishment of

this object to transfer a large part of its appellate jurisdiction to the Circuit Court of Appeals.

The Act has uniformly been so construed and applied by this Court as to promote its general purpose of lessening the burden of litigation in this Court, transferring the Appellate jurisdiction in a large class of cases to the Circuit Court of Appeals, and making the judgments of that Court final except in extraordinary cases; and the authority conferred upon this Court to compel by certiorari the Circuit Court of Appeals to certify records to this Court has been held by this Court to be a branch of its jurisdiction, which should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance.

American Construction Company vs. Jacksonville Railway Company, 148 U. S., 372.

It cannot for a moment be contended that the questions in controversy in this case are of "great moment," "peculiar gravity" or "general importance" in the sense contemplated under the holdings of this Court, and to grant the writ would be not only to override the spirit and intention of the Act, but to burden this Court with greater labor than was imposed upon it before the passage of the Act. If the writ sought in this case is granted, we see no reason why it should not be granted in any case, leaving it entirely to the pleasure of counsel and litigants to bring any cause to this Court by certiorari, and at any stage, without any sort of limitation or restriction by way of the exercise by this Court of its inherent discretionary powers.

It has been held by this Court that an appeal does not lie from the judgment of a Circuit Court remanding a cause to a State Court, such judgment being interlocutory and not final.

McLish vs. Roff, 148 U. S., 661–666.
Chicago Railway, vs. Roberts, 141 U. S., 690.

The analogy is perfect, it would seem, between those cases and the one under consideration, the order remanding the cause to the State Court upon questions of jurisdiction is interlocutory and not final, so the order of the Circuit Court of Appeals in this case remanding to the Circuit Court is jurisdictional, interlocutory and not final, and we submit is not the proper subject matter of review by this Honorable Court.

It is submitted that the writ ought to be refused:

1st. Because to grant it would override the spirit of the Act.

2nd. There is no question of peculiar gravity, importance or public moment involved.

3rd. The judgment sought to be reviewed is merely interlocutory and not final, and

4th. The decree or judgment complained of can result in no possible injury to Petitioner, because it awards a new trial, and if Petitioner has a meritorious defense to the action, there is no reason why the same should not and cannot be made in the lower Court under the order remanding.

JEROME TEMPLETON,
Solicitor.

R. H. SANSOM,
T. R. CORNICK,
Of Counsel.

RECORD.

Be it remembered that at a Circuit Court of the United States began and held for the Northern Division of the Eastern District of Tennessee, at the Federal Court rooms in the city of Knoxville, within said District and the Sixth Circuit, on the Second Monday—it being the 8th day of July, A. D. 1895.

Present and presiding the Honorable Chas. D. Clark, United States District Judge for the Eastern and Middle Districts of Tennessee, the following proceedings were had, to wit:

MONDAY MORNING, September 9th, 1895.

Court met pursuant to adjournment, present and presiding the Honorable Chas. D. Clark, United States District Judge for the Eastern and Middle Districts of Tennessee.

No. 1012.

Mary F. McConnell

vs.

Provident Savings Life Assurance Society of New York.

In this cause it appears that the Mandate, Judgment and Opinion of the Court of Appeals have been filed in this Court, reversing the final decree of this Court which dismissed Complainant's Bill on July 28th, 1894, and ordering this cause to be placed on the law side of the docket of this Court, and that the pleadings be reframed and the cause tried as a law case—

Said Mandate and Judgment of the Court of Appeals are in the following words, to wit:

United States Circuit Court of Appeals for the Sixth Circuit.

United States of America, Sixth Judical Circuit. } ss.

The President of the United States, to the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Tennessee,—Greeting:

Whereas, lately in the Circuit Court of the United States for the Eastern District of Tennessee, before you, or some of you, in a cause between Mary F. McConnell, Complainant, and the Provident Savings Life Assurance Society, Respondent, wherein the decree entered in said cause in said Court is in the following words, to-wit:

"Be it remembered that this cause came on for final hearing before the Honorable D. M. Key, Judge of the United States District Court, holding the United States Circuit Court at Knoxville, Tennessee, on this the 28th day of July, 1894, upon the pleadings and agreed state of facts with the exhibits to said agreed state of facts, including application for issuance and the policy issued thereon and exhibits with bill and answer, and the same having been considered by the Court, and the Court being of the opinion that the Complainant is not entitled to relief, the Court is pleased to order that the Complainant's bill be dismissed, and the Defendant have and recover of and from Complainant and C. L. McConnell, surety upon the prosecution bond, the costs of this cause, for which execution is awarded, as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals for the Sixth Circuit by virtue

of an Appeal agreeably to the Act of Congress in such cases made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-four, the said cause came on to be heard before the United States Circuit Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed that the decree of the said Circuit Court in this cause be and the same is hereby reversed, and the cause is remanded to the Court whence it came, with instructions to docket the cause on the law side of the Court with leave to reframe the pleadings. Costs to be divided.

July 2nd, 1895.

You, therefore, are hereby commanded that such proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 2nd day of August, in the year of our Lord one thousand eight hundred and ninety .....

Total costs: Clerk, $30.15; printing record, $60.70; attorney, $20—$110.90.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed: United States Circuit Court of Appeals for the Sixth Circuit. No. 258. October Term, 1894. Mary F. McConnell *vs.* The Provident Savings Life

Assurance Society of New York. Mandate. Filed Sept. 9th, 1895. H. H. Taylor, Clerk."

It is therefore ordered by this Court that the cause be re-instated upon the docket of this Court for further proceedings, in accordance with said Mandate, Judgment and Opinion of the Court of Appeals, and that each party pay one-half of the costs of said appeal, for which decree is hereby rendered against Complainant and C. L. McConnell, her surety on her prosecution bond, for one-half the costs, and against Respondent for the other half of said costs respectively, and executions are awarded for the same in accordance with this decree.

It is further ordered that the cause be docketed on the law side of the docket of this Court, to be tried as a law case, and that the pleadings be reframed to conform to the practice in this Court in law cases.

The Plaintiff, Mary F. McConnell, will be allowed two weeks after the entry of this decree within which to file her declaration on the cause of action set out in her original bill, and the Defendant will be allowed 60 days thereafter to plead to the same or make other defense.

TUESDAY MORNING, Sept. 10, 1895.

Court met pursuant to adjournment.

Present and presiding the Honorable Chas. D. Clark, United States District Judge for the Eastern and Middle Districts of Tennessee.

No. 1012.

Mary F. McConnell,

vs.

Provident Savings Life Assurance Society of New York.

Came the plaintiff, by her attorneys, and moved the Court to remand this case to the State Court because the original process in this case was served on February 27, 1894, and was returnable, and the Defendant was thereby, and by the law of the State, required to make defense in said State Court on the first Monday of March, 1894, which was the 5th day of the month of March, 1894, whereas the petition of removal was not filed by the Defendant until March 9th, 1894, which was too late; which motion being heard, the Court is of opinion is not well taken because the motion comes too late, and the same is therefore overruled. And to this action of the Court, Plaintiff excepts.

TUESDAY, October 8th, 1895.

Court met pursuant to adjournment, presiding at Chambers, at Chattanooga, the Hon. C. D. Clark, United States District Judge for the Eastern and Middle Districts of Tennessee.

No. 1012.
Mary F. McConnell,
vs.
Provident Savings Life Assurance Society of New York.

In this cause, by consent of the parties, it is ordered that the time for filing declaration by Plaintiff be extended to Monday, October 14th, 1895.

"O. K." (Signed), MARY F. MCCONNELL,
By Templeton & Cates.

PROVIDENT SAVINGS LIFE ASSURANCE
SOCIETY OF NEW YORK,
By George H. Pepper.

United States of America,
Eastern District of Tennessee, } ss.

I, H. H. Taylor, Clerk of the United States Circuit Court for the Eastern District of Tennessee, do hereby certify that the foregoing three orders are truly taken and correctly copied from the Journal of said Court, and that the foregoing four pages of type-written matter contain all the orders made in the cause mentioned in the caption since the same was remanded from the Circuit Court of Appeals for the Sixth Circuit.

Witness my hand and seal of said Court at office in Knoxville, Tennessee, this 13th day of November, A. D. 1895.

H. H. TAYLOR,
Clerk.

By J. T. CARTER,
Deputy Clerk.